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In The

Supreme Court of the United States

EDWARDO MONTOYA, ANTONIO MONTOYA, ESTEVAN MONTOYA, CARLOS MONTOYA, RICARDO MONTOYA, DANIEL MONTOYA, TOM GONZALES, and LEOPOLDO GONZALES,

Petitioners,

v.

TECOLOTE LAND GRANT by and through TECOLOTE BOARD OF TRUSTEES,

Respondents.

On Petition For Writ Of Certiorari To The New Mexico Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Edwardo Montoya, Antonio Montoya, Estevan Montoya, Carlos Montoya, Ricardo Montoya, Daniel Montoya, Tom Gonzales and Leopoldo Gonzales, plaintiffs below, respectfully pray that a writ of certiorari issue to the New Mexico Supreme Court to review the decision of the New Mexico Court of Appeals entered in this matter on November 26, 2007.

OPINIONS AND ORDERS BELOW

The New Mexico Supreme Court's Order quashing the January 16, 2008 writ of certiorari to the New Mexico Court of Appeals in Edwardo Montoya, Antonio Montoya, Estevan Montoya, Carlos Montoya, Ricardo Montoya, Daniel Montoya, Tom Gonzales and Leopoldo Gonzales v. Tecolote Land Grant by and through Tecolote Board of Trustees was issued October 17, 2008. (App. 1).

The mandate issued by the New Mexico Supreme Court to the New Mexico Court of Appeals was entered on October 17, 2008. (App. 3).

The New Mexico Court of Appeals opinion was entered on November 26, 2007. (App. 4).

The Final Judgment for Quiet Title in favor of the Petitioners was entered by the New Mexico District Court on October 5, 2005. (App. 33).

The District Court's Findings of Fact and Conclusions of Law were entered on September 17, 2003. (App. 36).

The Partial Stipulated Order and Judgment recognizing title in favor of the Petitioners for the Montoya Ranch was entered on May 2, 2003. (App. 69).

JURISDICTION

The New Mexico Supreme Court entered its order quashing the writ of certiorari to the New Mexico Court of Appeals on October 17, 2008. (App. 1). Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. §1257(a), and Supreme Court Rule 13.1.

UNITED STATES AND NEW MEXICO STATUTES

United States Statutes, Act of July 22, 1854, ch. 103, §8, 10 Stat. 308, 309 (1854), New Mexico Surveyor General Act:

> "That it shall be the duty of the Surveyor General, under such instructions as may be given by the Secretary of the Interior, to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico; and for this purpose, may issue notices,

> summon witnesses, administer oaths, and do and perform all other necessary acts in the premises. He shall make a full report on all such claims as originated before the cession of the territory to the United States by the treaty of Guadalupe Hidalgo, of eighteen hundred and forty-eight, denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages, and customs of the country before its cession to the United States . . . Such report to be made according to the form which may be prescribed by the Secretary of the Interior; which report shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm bona fide grants, and give full effect to the treaty of eighteen hundred and forty-eight between the United States and Mexico; and, until final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the previous provisions of this act."

United States Statutes Act of Dec. 22, 1858, ch. 5, 11 Stat. 374 (1858), An act to confirm the Land Claim of certain Pueblos and Towns in the Territory of New Mexico:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that . . .

> Number seven, of the Town of Tecolote in the County of San Miguel . . . reported for the favorable action of Congress, by the said surveyor-general on the thirtieth of September, eighteen hundred and fifty-seven . . . to the Department of the Interior, be, and [is] hereby, confirmed; and the Commissioner of the Land-Office shall issue the necessary instructions for the survey of all of said claims, as recommended for confirmation by the said, and shall cause a patent to issue therefore as in ordinary cases to private individuals: Provided, That this confirmation shall only be construed as a relinquishment of all title and claim of the United States to any such lands, and shall not affect any adverse valid rights, should such exist."

United States Patent to the Town of Tecolote, June 21, 1902:

> "Now Know Yc, That the United States of America, in consideration of the premises and in accordance with the provisions of the aforesaid Act of Congress of the twenty second day of December one thousand eight hundred and fifty eight Has Given and Granted and by these presents Does Give and Grant unto the said Town of Tecolote the tract of land described and embraced in the foregoing survey; but with the proviso contained in the said act of Congress of the twenty-second day of December one thousand eight hundred and fifty-eight, That this patent shall only be construed as a relinquishment of all title and claim of the United

> States of any of said lands and shall not affect any adverse valid rights, should such exist. To Have and To Hold the said tract of land with the appurtenances unto said Town of Tecolote its successors and assigns forever with the proviso aforesaid."

New Mexico Statutes Annotated (NMSA), §37-1-21, Real Property held under governmental deed, devise or grant; ten years possession confirms title; exception for persons under disability. (*See* App. 76 for full text).

New Mexico Statutes Annotated, §47-1-25, Rights of persons in possession under Spanish and Mexican grants:

> "Every person or persons being of the class or condition that have held or hold, in lawful possession under a legitimate title, derived from the authorities of Spain or Mexico, which, according to the laws at that time, had legitimate authority to grant such title to property, upon whatever lands belonging to said governments, prior to the treaty of peace by the latter with the United States, who actually find themselves in legal possession upon said lands, in quiet and peaceful possession, and without being interrupted, from the time that the government of the United States comprised within its limits this state; the said persons are entitled to a lawful claim of property and legal ownership under the limits thereof, to the lands mentioned, in the same manner as those who had acquired by purchase, inheritance or legal

conveyance, be the same whatever it may, according to the law, exclusively and against any other person whatsoever, who lay claim subsequent to that date."

STATEMENT OF THE CASE

The Petitioners brought suit for quiet title and declaratory judgment against the Tecolote Land Grant for 19,320 acres of property located entirely within the boundaries of the Tecolote Land Grant. The Tecolote Land Grant is located near Las Vegas, New Mexico and includes approximately 48,000 acres within its exterior boundaries. The Petitioners are the direct descendants of Salvador Montoya, who was granted title from the Mexican government to the property claimed by the Petitioners, and his son Jose Maria Montoya, who lived on the property from 1839 until his death in 1902. The Respondents, the Tecolote Land Grant and the Tecolote Board of Trustees (hereinafter "Tecolote"), are the corporate body and its board of directors established by the Territorial Government of New Mexico in 1903, pursuant to NMSA 1978 §§49-10-1 to -6 to manage and control the Tecolote Land Grant. They are–the successor to the former Town of Tecolote.

The property that makes up the Tecolote Land Grant was part of the province of New Spain known as Nuevo Mexico and was controlled by Spain until 1821 and by Mexico until 1848. In order to encourage settlement of Nuevo Mexico, Spain issued grants of

land to both individuals and communities. After Mexico gained independence from Spain in 1821, Mexican officials continued to issue land grants to both individuals and communities. Conflicts between Mexico and the United States resulted in the Mexican-American War, which ended on February 2, 1848 with the signing of the Treaty of Guadalupe Hidalgo. Pursuant to the Treaty, which ceded present day New Mexico to the United States, the United States agreed to acknowledge existing property rights under Spanish and Mexican law.

Numerous grants of land were made in the New Mexico territory. In order to establish the validity of the land grants as between the claimants to the grants and the United States, Congress established the Office of the Surveyor General to conduct administrative proceedings to determine the status of land grant claims. (New Mexico Surveyor General Act, United States Statutes, Act of July 22, 1854, ch. 103, §8, 10 Stat. 308, 309 (1854)). The Surveyor General's reports on the various land grants were submitted to Congress for confirmation. For those land grants confirmed by Congress, a United States patent was issued.

On December 22, 1858, Congress confirmed the Tecolote Land Grant as a community grant to the Town of Tecolote and, in 1902, the United States issued a Patent to the Town of Tecolote. The Congressional Confirmation and the Patent settled the claims to the land only as between the United States and the Town of Tecolote. Both the Congressional

Confirmation and the Patent contain specific reservation of rights language stating that "this confirmation shall only be construed as a relinquishment of all title and claim of the United States to any of said lands, and shall not affect any adverse valid rights, should such exist." (App. 74, Act of Dec. 22, 1858, ch. 5, 11 Stat. 374 (1858); App. 15, *Edwardo Montoya, et al. v. Tecolote Land Grant,* 176 P.3d 1145 (N.M.App. 2007), ¶16, quoting June 21, 1902 Patent to the Town of Tecolote). Thus, the United States recognized the possibility that third parties could bring claims for adverse valid rights against the Tecolote Land Grant.

In bringing suit against Tecolote, the Petitioners *did not* challenge the origin, nature, character, size or proper grantee of the Tecolote Land Grant, nor did they challenge the 1858 Congressional Confirmation or the 1902 Patent issued to the Land Grant. Instead, the Petitioners brought a claim for recognition of valid private property rights to 19,320 acres that are located within the recognized and accepted boundaries of the Tecolote Land Grant. The Petitioners' claim of ownership is based on an 1825 Grant to Salvador Montoya and others from the Mexican Government, an 1838 Judicial Repartimiento of the Grant, statutory possession under NMSA §47-1-25 and adverse possession under NMSA §37-1-21.

Tecolote filed a motion for summary judgment arguing that the District Court lacked jurisdiction to hear the Petitioners' claims for valid adverse rights. The District Court denied the motion for summary judgment and found that it had jurisdiction based on

the reservation of rights language in the Congressional Confirmation and the United States Patent and on NMSA §37-1-21 and §47-1-25, which set forth the elements for establishing statutory possession and inherently grant the District Court jurisdiction to enforce statutory provisions. (App. 57, ¶2).

The District Court held a trial on the merits of the Petitioners' claims on March 31, April 1, 2, and 3, 2003. The evidence presented by the Petitioners at trial demonstrated that the Petitioners have property rights based on historic control of lands within the current Tecolote Land Grant. There was ample evidence of the open, hostile adverse nature of the Plaintiffs' predecessors use and control of the property, which was set forth in the District Court's Findings and Conclusions. (App. 36). In 1825, the Mexican Government granted title to Salvador Montoya for land that is within the boundaries of the current Tecolote Land Grant. Salvador Montoya died in 1840 and his son, Jose Maria Montoya, lived on the land grant continuously from 1839 until his death in 1905.

In 1838, a "Repartimiento" by the Mexican Government allotted lands within the Montoya Grant to certain persons, who were not members of Salvador Montoya's family. The 1838 Repartimiento confirmed and recognized the possession and ownership of Salvador Montoya to the remainder of the grant located to the south and southeast of the Wagon Road. The Wagon Road, which defined the boundary of the 1825 grant owned and controlled by the Montoyas, ran through the 1825 Grant, was part of

the historic Camino Real and is generally accepted as being where U.S. Interstate 25 is today. Between 1858 and 1902, Jose Maria Montoya claimed the property south and southeast of the Wagon Road, which is within the boundaries of the 1825 Grant. Jose Maria Montoya's claim to the property was recognized in the community.

Jose Maria Montoya continuously occupied the entire area of the Tecolote Land Grant south and southeast of the Wagon Road from 1840 through 1902. He took numerous actions consistent with possession and control of the property, including granting deeds of right of way to the Santa Fe Railroad and the Postal Telegraph Company, pursuing injunctions against four separate individuals for trespass and taking natural resources from his land. In 1882, San Miguel County served a Summons on Jose Maria Montoya, as "a claimant to the Tecolote Grant," for taxes due for the Grant. Jose Maria Montoya deeded property to nine of his heirs in 1901. In testimony at trial, the President of the Tecolote Land Grant Board of Trustees recognized those deeds as valid private ownership documents that transferred title of those tracts, known as the Montoya Ranch, to Jose Maria Montoya's heirs. The Montoya Ranch is located entirely within the boundaries of the Tecolote Land Grant and is in excess of 5,000 acres. The Partial Stipulated Order and Judgment recognizing title in the Petitioners to the Montoya Ranch was entered on May 2, 2003. (App. 69).

Trial testimony also demonstrated that adverse holdings within the interior boundary of the Tecolote Land Grant were, and are, recognized by the Board and that the Tecolote Land Grant recognizes the authority of the courts to adjudicate adverse land claims within the boundaries of the Land Grant. The Board governing the Tecolote Land Grant does not have any practice or method for recognizing or confirming a holding of real estate based on a conveyance or grant prior to a deed from the Grant and does not have a definition, interpretation or understanding of valid adverse rights, as required by NMSA §49-10-5(A)(2).

Following the trial, the District Court concluded that the Petitioners have superior title to the 19,320 acres as against the Tecolote Land Grant based on 1) superior title originating under Mexican law; 2) statutory possession and fee simple title pursuant to NMSA §47-1-25 (rights of persons in possession under Spanish and Mexican grants); and 3) adverse possession pursuant to NMSA §37-1-21. (App. 58, ¶¶3-5).

The District Court found that the Petitioners valid adverse rights were not extinguished by the Congressional Confirmation of the Land Grant or the United States Patent issued to the Town of Tecolote because the Confirmation and Patent only relinquished the rights of the United States. (App. 60-61). Both the Confirmation and the Patent, by specifically stating that they "shall not affect any adverse valid rights," reserved the rights of the Petitioners to bring claims for valid adverse rights against Tecolote. In

recognizing the Petitioners' adverse valid rights and superior title as against Tecolote Land Grant, the District Court did not in any way alter the terms of the Congressional Confirmation or the United States Patent. The Tecolote Land Grant remains a community land grant held by the Respondents. The boundaries of the Tecolote Land Grant remain the same as those recognized in the Congressional Confirmation and the United States Patent. The District Court's decision that the Petitioners have superior title to the property in question is consistent with specific language in the Congressional Confirmation and the Patent, and is consistent with historic facts and with applicable caselaw and statutes.

The Tecolote Land Grant appealed the District Court decision in favor of the Petitioners. After full briefing, the Court of Appeals issued an Opinion on November 26, 2007. (App. 4). The Court of Appeals, based on the jurisdictional bar in *Tameling v. United States Freehold & Emigration Co.*, 93 U.S. 644 (1876) (the *Tameling* bar), concluded "that the district court had no authority to alter the terms of the Congressional Confirmation and United States Patent," reversed the judgment of the district court and ordered the matter to be remanded to the district court with instructions to dismiss the complaint. (App. 5 at ¶1, App. 32 at ¶33). Contrary to the conclusion of the Court of Appeals, the District Court did not alter the terms of either the Congressional Confirmation or the United States Patent. Instead, pursuant to the specific language in the Congressional Confirmation and

Patent regarding adverse claims of third parties and New Mexico statutory provisions found at §47-1-25 and §37-1-21, the District Court properly exercised its jurisdiction to declare rights in the disputed land as between the Petitioners and the Tecolote Land Grant.

The Petitioners sought review by the New Mexico Supreme Court, which was granted by writ of certiorari on January 16, 2008. After full briefing and oral argument, the New Mexico Supreme Court quashed the writ of certiorari on October 17, 2008 and remanded the matter to the New Mexico Court of Appeals, thus upholding the decision of the Court of Appeals determining that the District Court did not have jurisdiction to hear the Petitioners' valid adverse claims against Tecolote. (App. 1-3).

BASIS FOR GRANTING THE WRIT

The Petition for Writ of Certiorari should be granted because the decision of the New Mexico Court of Appeals is contrary to the established precedent of this Court holding that Congressional confirmation is not conclusive as to adverse valid rights to property within a land grant and that it is within the jurisdiction of the courts to determine, as to third party claims, whether or not the third party has superior claims to property within the land grant and to determine, based on the applicable facts and circumstances, the extent of such adverse rights. The decision of the New Mexico Court of Appeals

improperly extended the holding in *Tameling v. United States Freehold & Emigration Co.*, 93 U.S. 644 (1876), ignored specific language in the Congressional Confirmation and Patent reserving the rights of third parties, is contrary to decisions of this Court interpreting the reservation of rights language, is inconsistent with earlier New Mexico court decisions that determined adverse valid rights within the boundaries of confirmed land grants, and effectively overturns specific statutory provisions applicable to adverse claims under Spanish and Mexican law.

A. The decision of the New Mexico Court of Appeals is inconsistent with holdings of this Court regarding the reservation of rights language in the Congressional Confirmation.

In order to understand the Court of Appeals decision in this matter, it is important to understand what was and was not determined by the District Court. The Court of Appeals based its holding that the District Court did not have the authority to hear the Petitioners' claims on the conclusion that the District Court, by finding in favor of the Petitioners, altered the terms of the Congressional Confirmation and the 1902 Patent. (App. 5 at ¶1, App. 25 at ¶28, App. 29 at ¶31). The Court of Appeals incorrectly stated that the Petitioners sought to "convert 19,320 acres of the original 48,123 acres of the Tecolote Land Grant into private property." (App. 29 at ¶31). While it is true that the Petitioners sought recognition of

valid adverse property rights within the Land Grant, such a recognition did "convert" property held by the Land Grant into private property because the property was always private property and never was owned by the Land Grant. The District Court decision, by recognizing historic private property rights within the boundaries of the Land Grant did not alter either the Confirmation or the Patent.

Contrary to the conclusion of the Court of Appeals, the District Court did not alter either the Congressional Confirmation or the federal Patent establishing the Tecolote Land Grant. In their original Complaint, and throughout the course of proceedings below, the Petitioners asked the District Court to determine only the factual question of whether they hold valid adverse private property rights to specific property located within the boundaries of the Tecolote Land Grant. The Petitioners did not challenge the 1858 Congressional Confirmation or the 1902 Patent, and did not challenge the true origin, nature, character, size or proper grantee of the Grant. The Petitioners recognized that the Tecolote Land Grant is a community grant and that the Town of Tecolote is the proper grantee, as set forth in the Act of Congress of December 22, 1858, ch. 5, 11 Stat. 374.

The only basis for the Court of Appeals conclusion that the District Court altered the terms of the Confirmation and Patent seems to be that the recognition of the Petitioners' valid adverse private property rights, in and of itself, constitutes an alteration of the terms of the Confirmation and Patent. The

Court of Appeals' conclusion cannot be squared with the fact that there are a number of provisions for addressing the recognition of valid adverse private property rights within the boundaries of confirmed land grants, as discussed in more detail below. The recognition of *any* private property within the boundary of a recognized land, whether based on adverse possession or any other legal claims, necessarily changes the amount of community property within a land grant. Based on the Court of Appeals' reasoning, the recognition of even one acre of private property rights within the Land Grant would alter the terms of the Confirmation and Patent and would not be allowed. Such an outcome is inconsistent with the specific language in the Confirmation and Patent reserving adverse valid rights, with cases from this Court and with New Mexico statutes addressing adverse rights within land grants. It is also inconsistent with the fact that the Board of the Tecolote Land Grant has recognized numerous private property rights within the Land Grant. It is also inconsistent with the Board's recognition of the validity of the deeds from Jose Maria Montoya for the 5,000+ acre Montoya Ranch.

The Court of Appeals relied on *Tameling v. United States Freehold & Emigration Co.*, 93 U.S. 644 (1876) to determine that the District Court did not have jurisdiction to hear the Plaintiffs' claims. (App. 18-19, ¶¶20-21). The Court of Appeals is correct in its statement that "*Tameling* holds that under the New Mexico Surveyor General Act, when Congress

confirms a land grant, its determination concerning the origin, nature, character and size of a land grant is conclusive and is not subject to attack in a court or any other forum." (*Id.* at ¶21). However, *Tameling* and its progeny only apply to cases in which a claimant is challenging the true nature, size or proper grantees of the grant itself, which the Petitioners did not do in this case. The cases relied on by the Court of Appeals concerned challenges to the grant itself, rather than the resolution of adverse claims within the boundaries of a recognized land grant.

Neither *Tameling* nor the other cases relied on by the Court of Appeals are applicable to the claims brought by the Petitioners. The Court of Appeals ignored the fact that the Petitioners are not challenging the confirmation of the grant. The Court of Appeals decision improperly extends the *Tameling* bar to prevent third parties from bringing adverse claims to property located within the recognized boundaries of a land grant even when the claimants are not challenging the origin, nature, character or size of the land grant.

The Court of Appeals decision is contrary to the specific language in the Congressional Confirmation reserving third party rights and is contrary to decisions of this Court interpreting the reservation of rights language. Reservation of rights, such as that included in the Tecolote Land Grant Confirmation, were included in all confirmatory acts and acts establishing confirmation tribunals. (*See* App. 151, *Board of Trustees of Anton Chico Land Grant v. Brown*,

identifying other Acts of Congress that included reservation of rights language). In both *Rodrigues v. United States*, 68 U.S. 582 (1863) and *Beard v. Federy*, 70 U.S. 478 (1865), this Court addressed the language reserving adverse valid rights of third parties. In both those cases, the Court stated that the confirmation of land grants by the United States was not "conclusive against anyone but the claimant and the United States." *Rodrigues*, 68 U.S. at 588; *Beard*, 70 U.S. at 491. In *Beard*, the Court stated that the reservation of rights language applies to "those who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property." 70 U.S. at 493. Congressional confirmation and the granting of a patent only confirms the interest that the claimant had at the time of the confirmation and did not add any additional rights and did not extinguish valid adverse rights of third parties. *Id.* at 491. The reservation of rights language recognizes and codifies this principle and allows third parties, such as the Petitioners, to bring claims for the recognition of private property within established land grant boundaries.

Following the *Beard* decision, this Court established that confirmation is conclusive as against the United States and as against a mere intruder or one claiming a title originating under the United States subsequent to the change of sovereignty. (*See* App. 153-154, *Brown*, citing to *Tameling v. U.S. Freehold & Emigration Co.*, 93 U.S. 644, 23 L.Ed. 998; *Knight v. United Land Association*, 142 U.S. 161, 12 S.Ct.

258, 35 L.Ed. 974 (1891); *Russell v. Maxwell Land Grant Co.*, 158 U.S. 253, 15 S.Ct. 827, 39 L.Ed. 971 (1895)). In cases where a litigant is challenging either the Confirmation itself or is in the class of a "mere intruder," the Confirmation is conclusive and the courts do not have jurisdiction to hear the litigants' claims. However, this Court also established that, in cases where adverse parties claim title under the former sovereign which is entitled to protection by the United States, confirmation is not conclusive and it is for the courts to decide who had superior title. (*See* App. 154, *Brown,* citing to United States Supreme Court decisions).

The New Mexico Supreme Court addressed the reservation of rights and the jurisdiction of the New Mexico courts to hear valid adverse claims in the *Brown* case. Relying on the same reservation of rights language as in the Tecolote Land Grant and on the decisions of this Court interpreting the reservation of rights language, the New Mexico Supreme Court held that, in cases where a third party claims valid title under the former sovereign, Congressional confirmation of a land grant is not conclusive as to the rights of the third party claimant and it is for the courts to determine which claimant has the better right. The *Brown* Court specifically held that *Tameling* does not act as a bar to the courts exercising jurisdiction to determine valid third party adverse claims to property within a confirmed land grant.

After discussing the holding in *Tameling,* the *Brown* Court stated that, where the adverse party

claims superior title under the former sovereign, Congressional confirmation of the land grant "is not conclusive, and it is for the Courts to decide which claimant has 'the better right'." (App. 154, citing to *Beard* and other United States Supreme Court decisions). The *Brown* Court based its holding specifically on the reservation of rights contained in the confirming acts, which applies to claimants "who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property." (App. 153, quoting *Beard*). The Court stated that the face value of the reservation language should not be discounted because it reserves the right of private claimants whose title is based on Mexican law to contest title to private property within the land grant. (App. 155). Finding that this "was uniform policy," the Court held that, by means of the reservation language, Congress specifically left the question of the adjudication of conflicting private claims to the courts. (*Id.*).

Contrary to the Court of Appeals Opinion, the holding in *Brown* is not limited to disputes between two confirmed grantees. (App. 25 at ¶27). The Court in *Brown* did not limit adverse third party claims to those with either a "perfected title" or to those that had already been confirmed by Congressional action. Instead, both *Brown* and *Beard* specifically state that "third persons," as the term is used in the Congressional confirmation of the land grants and the patents, includes those who hold superior title. (App. at 153; 70 U.S. at 493). Neither case limits the definition

of "third persons" or "superior title" in such a way as to exclude claims of adverse possession, which is an established means of proving superior title to a particular property.

The Petitioners are third persons claiming adverse valid rights superior title to lands within the confirmed Land Grant. The holdings in *Brown* and *Beard* support the District Court's exercise of jurisdiction to decide the Petitioners adverse claims against the Tecolote Land Grant. The Court of Appeals decision, which impermissibly extends the holding in *Tameling* to apply to conflicting private claims, precludes the courts from exercising jurisdiction over adverse valid claims and is in conflict with this Court's holdings in *Rodrigues, Fedory* and other cases in which the Court held that Congressional confirmation was not conclusive as to third parties with claims of superior title.

The Court of Appeals decision that the District Court did not have jurisdiction to hear this matter ignores the specific language reserving the rights of third parties to assert valid existing rights and is contrary to the holdings of this Court. The Petitioners' quiet title claim is precisely the type of claim that the reservation language is meant to protect – claims to title in lands within a land grant which are based on Spanish or Mexican law and which existed prior to the date on which the Congressional Confirmation was made and prior to the issuance of the Patent. The Congressional Confirmation and the Patent did not extinguish the Petitioners' valid existing rights. The

reservation language was included in the Confirmation and the Patent for the specific purpose of protecting the rights of third parties and should not be ignored or effectively eliminated by extending the holding in *Tameling* to prevent District Courts from hearing adverse valid claims to property within the boundaries of a land grant.

B. The decision of the New Mexico Court of Appeals extending the *Tameling* bar to prevent the District Court from hearing valid adverse claims is inconsistent with statutory provisions passed by the New Mexico Legislature.

Article II, §5 of the New Mexico Constitution states that all private property rights in New Mexico that originated under Spanish and Mexican law were guaranteed to the people of New Mexico by the Treaty of Guadalupe Hidalgo and are preserved inviolate. The existence of private property claims within land grants is a fundamental concept rooted in historic practice and was recognized by the New Mexico Legislature in a number of statutory provisions. The principles set forth in *Tameling* do not bar the New Mexico Legislature from determining how New Mexico District Courts are to resolve adverse property claims arising within confirmed grants, regardless of whether those claims arose before or after a patent was issued. The *Tameling* bar should not be extended to cases in which the Petitioners do not challenge the terms of the Congressional Confirmation or the terms of the

Patent, particularly when the New Mexico legislature passed specific statutes that provided a means for addressing valid adverse claims. The case at bar falls within the jurisdiction of New Mexico District Courts to effectuate statutes, including §47-1-25 and §37-1-21 NMSA 1978.

Both NMSA §37-1-21, passed in 1857, and §47-1-25, passed in 1863, recognize rights of persons in possession of property under Mexican or Spanish law. Section 47-1-25 provides for the recognition of the rights of persons in possession of property under Spanish and Mexican grants, and §37-1-21 NMSA 1978 provides for the recognition of property rights in Spanish or Mexican grants based on adverse possession. Claims under §47-1-25 require Courts to determine if the claimants had valid rights and title pursuant to Spanish or Mexican law, either through possession or based on deeds or grants. In order to make such a determination, the Courts necessarily have to look at the factual and legal basis for the claims during the time that Spanish and Mexican law were in effect. NMSA §47-1-25 requires the Courts to do exactly what the Court of Appeals decision prohibits – which is to look at the facts and law pre-existing the confirmation of land grants in order to determine the validity of private claims within the land grants.

In *Montoya v. Unknown Heirs of Vigil*, 16 N.M. 349, 120 P.2d 676 (S.Ct. 1911) (App. 80), the New Mexico Supreme Court discussed the purpose of §37-1-21, referred to by the *Montoya* Court as Section 2937. A review of the *Montoya* case demonstrates that

the purpose of the statute is consistent with the reservation of rights in the Congressional Confirmations. The statute provides a means, through an action brought before the New Mexico District Courts, to resolve private property disputes within the boundaries of a confirmed land grant. (App. 76). As the New Mexico Supreme Court stated, the statute "was intended to grant affirmative relief by way of conferring title upon the pioneer agricultural settlers as a reward of honest toil and diligence, indicating good faith in the settlement and improvement of what was at that time a comparatively barren and sparsely settled section, as, indeed, the whole territory was at that time, for that matter." (App. 115). The statute was "applicable to Spanish or Mexican land grants only." (App. 118).

The *Montoya* case, decided by the District Court and affirmed by the New Mexico Supreme Court, involved numerous private property claims to property located within the boundaries of the Alameda Land Grant, which was confirmed in 1892. (App. 99). Clearly, a District Court has jurisdiction to review the facts and circumstances after Congressional confirmation to see if the elements of the adverse possession act in effect at the time were met. The State of New Mexico, in passing §37-1-21 and §47-1-25, clearly recognized that there existed private claims on land grants by people in possession at the time of confirmation and provided a means whereby such claims could be recognized. The Court of Appeals decision is inconsistent with the specific statutes

passed by the New Mexico State Legislature and effectively renders the statutory provisions ineffective, inoperative and moot.

C. The decision of the New Mexico Court of Appeals decided an important question in a way that conflicts with relevant decisions of this Court and with the specific language in the Congressional Confirmation.

The Court of Appeals decision raises an issue of substantial public interest that should be determined by this Court. By extending the *Tameling* bar to include the claims brought by the Petitioners, the decision divests the New Mexico District Courts of jurisdiction to determine adverse claims within the boundaries of land grants even though the Congressional Confirmation and the Patent protect such adverse valid claims and even though the New Mexico Legislature clearly recognized the need to adjudicate and confirm private adverse claims within confirmed land grants and provided the means for such claims to be brought. As already shown, the Congressional Confirmation and the Patent specifically recognize that there may be adverse valid claims and §47-1-25 and §37-1-21 provide the means for determining the validity of the adverse claims. In addition, the statute governing the Tecolote Land Grant gives the Tecolote Board of Trustees the authority to recognize and confirm adverse claims within the Tecolote Land Grant. NMSA §49-10-5(A)(2). Indeed, the Tecolote Board of Trustees recognized the

Petitioners' adverse claims to the Montoya Ranch as part of the litigation in this matter.

The Court of Appeals decision improperly extends the *Tameling* bar to prevent third parties with adverse claims, who are not challenging the grant itself, from bringing their claims to court pursuant to both the reservation of rights and specific statutes passed by the New Mexico Legislature. The Court of Appeals decision, if upheld, would impact thousands of private holders within land grant boundaries who derive title from the same factual and legal bases as the Petitioners. The decision ignores and overrides the Supreme Court's holding in *Brown*, specific language of the Congressional Confirmation and the Patent, and specific New Mexico statutory provisions that allow for the recognition of adverse property claims within the boundaries of a land grant.

CONCLUSION

Congress did not prohibit the State of New Mexico from determining private claims within land grants, nor was it a function of the Surveyor General or Congress to resolve any conflicting private property rights within the exterior boundaries of a land grant. The Court of Appeals decision that *Tameling* bars the District Court from hearing valid property rights disputes within an existing grant renders the specific language regarding adverse valid rights in the Confirmation and Patents meaningless, renders

State statues moot and leaves third party claimants without an avenue for resolving private property disputes within the boundaries of a land grant.

Based on the specific reservation of rights in the Congressional Confirmation of the Tecolote Land Grant and the Patent, specific decisions of this Court interpreting the reservation of rights, the authority of the Tecolote Board of Trustees to recognize and confirm adverse claims, New Mexico statutes allowing statutory possession and adverse possession to establish title, and applicable case law, the District Court properly exercised its jurisdiction to hear and decide the Petitioners' adverse claims against the Tecolote Land Grant.

For the foregoing reasons, this Court should issue its writ of certiorari to review the decision of the New Mexico Court of Appeals.

Respectfully submitted,

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Counsel for Petitioners

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

October 17, 2008

NO. 30,808

EDWARD MONTOYA, ANTONIO MONTOYA
ESTEVAN MONTOYA, CARLOS MONTOYA,
RICARDO MONTOYA, DANIEL MONTOYA,
TOM GONZALES and LEOPOLDO GONZALES,

Plaintiffs-Petitioners,

v.

TECOLOTE LAND GRANT by and through
TECOLOTE BOARD OF TRUSTEES,

Defendants-Respondents.

ORDER

WHEREAS, this matter came on for consideration upon petition for writ of certiorari filed pursuant to Rule 12-502 and response thereto, and the Court having considered said pleadings and being sufficiently advised, issued its writ of certiorari on January 16, 2008;

WHEREAS, having considered the petition, response, briefs, and oral argument by the parties, the judgment of the Court is that the writ shall be quashed as improvidently granted, Chief Justice Edward L. Chávez, Justice Patricio M. Serna, Justice Petra Jimenez Maes, Justice Richard C. Bosson, and Justice Charles W. Daniels concurring;

NOW, THEREFORE, IT IS ORDERED that the writ of certiorari issued on January 16, 2008, hereby is QUASHED; and

IT IS FURTHER ORDERED that the record proper, transcript of proceedings, and exhibits shall be returned to the New Mexico Court of Appeals.

IT IS SO ORDERED.

WITNESS, Honorable Edward L. Chávez, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 17th day of October, 2008.

(SEAL)

/s/ Kathleen Jo Gibson
Kathleen Jo Gibson, Chief Clerk
of the Supreme Court of the
State of New Mexico

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

MANDATE NO. 30,808

TO the New Mexico Court of Appeals, GREETINGS:

WHEREAS, in cause numbered 26,170 on your civil docket, wherein Edward Montoya, et al., were plaintiffs, Tecolote Land Grant was defendant, an opinion was issued by the New Mexico Court of Appeals on November 26, 2007;

WHEREAS, the cause was afterwards brought by plaintiffs into this Court for review by petition for writ of certiorari, and a writ of certiorari was issued on January 16, 2008; and

WHEREAS, an order quashing the writ of certiorari was entered on October 17, 2008.

NOW, THEREFORE, this cause is remanded to you for further proceedings, if any.

WITNESS, Honorable Edward L. Chávez, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 17th day of October, 2008.

(SEAL)

/s/ Kathleen Jo Gibson
Kathleen Jo Gibson, Chief Clerk
of the Supreme Court of the
State of New Mexico

176 P.3d 1145

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

Docket No. 26,170

November 26, 2007

EDWARDO MONTOYA, ANTONIO MONTOYA, ESTAVAN MONTOYA, CARLOS MONTOYA, RICARDO MONTOYA, DANIEL MONTOYA, TOM GONZALES, AND LEOPOLDO GONZALES, PLAINTIFFS-APPELLEES,

v.

TECOLOTE LAND GRANT BY AND THROUGH TECOLOTE BOARD OF TRUSTEES, DEFENDANTS-APPELLANTS.

APPEAL FROM THE DISTRICT COURT
OF SAN MIGUEL COUNTY
Daniel A. Sanchez, District Judge.

Domenici Law Firm, P.C., Pete V. Domenici, Jr., Charles N. Lakins Albuquerque, NM, for Appellees.

Clara Ann Bowler Albuquerque, NM Charles R. Thompson, Albuquerque, NM, for Appellants New Mexico Legal Aid, Inc.

Ryan Golten, David Benavides, Margret Carde, Santa Fe, NM, for Amicus Curiae La Merced Del Pueblo De Chililí, Cañon de Carnué Land Grant, and Anton Chico Land Grant.

The opinion of the court was delivered by: VIGIL, Judge

Certiorari Granted, No. 30,808, January 16, 2008

OPINION

{1} This is a land grant case in which we are called upon to determine the effect of an Act of Congress confirming the origin, nature, character, and size of the Tecolote Land Grant, and the United States Patent that then conveyed the property to the Town of Tecolote in compliance with the Congressional Confirmation. Relying on documents and conduct that predated the Congressional Confirmation and United States Patent, the district court entered judgment that Plaintiffs acquired private ownership title to a portion of the Tecolote common lands by adverse possession. Thus, common lands within the Tecolote Land Grant were transformed into Plaintiffs' privately owned land. We conclude that the district court had no authority to alter the terms of the Congressional Confirmation and United States Patent and reverse the judgment of the district court.

GENERAL LAND GRANT HISTORY

{2} The land comprising the Tecolote Land Grant is near what is now Las Vegas, New Mexico. The land was within the province of New Spain called Nuevo Mexico that existed from the late sixteenth century up through the early nineteenth century after Spain colonized the New World and its native pueblo inhabitants. In order to encourage population of the province, Spain issued grants of

land to individuals, groups, pueblos, and towns. Two types of grants were generally recognized: individual grants and community land grants. Individual grants were made to specific individuals, while community land grants granted each settler an allotment of land for a household and a tract of land to farm, with common lands set aside for use by the entire community. The grants to communities and towns were modeled after similar communities established in Spain, where the king had granted lands adjacent to towns for common use by all the residents of the town.

{3} After Mexico achieved independence from Spain in 1821, Mexican officials continued the practice of issuing such land grants to encourage settlements in unoccupied areas and to ward off United States encroachment on Mexican territory. Friction between the United States and Mexico, particularly in Texas, ultimately led to the United States declaring war on Mexico on May 13, 1846. The Mexican-American War ended on February 2, 1848, with the signing of the Treaty of Guadalupe Hidalgo.

{4} The Treaty of Guadalupe Hidalgo gave the United States undisputed control of Texas, established the Rio Grande River as the United States-Mexican border, and ceded to the United States the present-day states of California, Nevada, Utah, parts of Colorado, Arizona, New Mexico, and Wyoming. Article VIII of the Treaty of Guadalupe Hidalgo guaranteed, "In the said territories, property of every kind, now belonging to Mexicans . . . shall be

inviolably respected." However, the Treaty of Guadalupe Hidalgo was not self-executing, and Congress established different adjudication systems, by which Mexican landowners were required to demonstrate the legitimacy of their claims under Spanish and Mexican law to have their rights confirmed by the United States.

{5} The first legislation was passed in 1851 to address Spanish and Mexican land grants in California. Act of Mar. 3, 1851, ch. 41, 9 Stat. 631 (1851) (California Commissioner Act) ("An Act to ascertain and settle the private Land Claims in the State of California."). In pertinent part, the Act established a three-person Commission. Id. § 1, 9 Stat. at 631. All persons claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government were required to submit a claim for such lands to the Commission within two years after the statute was enacted. Id.§ 13, 9 Stat. at 633. The Commission heard from the claimant and a United States agent who was required to be present at all Commission meetings to "superintend the interests of the United States," and all testimony before the Commissioners was required to be transcribed. Id. §§ 4, 9, 9 Stat. at 631-32. The claimant and the United States were both entitled to appeal the Commission's decision to the United States District Court, where the court could consider new evidence as well as the evidence presented to the Commission. Id. §§ 10-13, 9 Stat. at 633-34. Either party could then appeal the district court decision to the United States

Supreme Court. Id. After the claim was confirmed by Congress, the grant was surveyed by the Surveyor General of California, the survey was submitted to the General Land Office of the Interior Department, and a United States patent was issued to the claimant. Id. § 13, 9 Stat. at 633-34.

{6} Congress established a completely different system to address Spanish and Mexican land grant claims in the New Mexico Territory. Passed in 1854, the New Mexico Surveyor General Act created the Office of the Surveyor General to conduct administrative proceedings to determine the status of land grant claims. This Act directed:

> That it shall be the duty of the Surveyor[ ]General, under such instructions as may be given by the Secretary of the Interior, to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico; and, for this purpose, may issue notices, summon[ ] witnesses, administer oaths, and do and perform all other necessary acts in the premises. He shall make a full report on all such claims as originated before the cession of the territory to the United States by the treaty of Guadalupe Hidalgo, of eighteen hundred and forty-eight, denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages, and customs of the country before its cession to the United States; and shall also make a report in regard to all pueblos existing in the Territory,

> showing the extent and locality of each, stating the number of inhabitants in the said pueblos, respectively, and the nature of their titles to the land. Such report to be made according to the form which may be prescribed by the Secretary of the Interior; which report shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm bona fide grants, and give full effect to the treaty of eighteen hundred and forty-eight between the United States and Mexico [The Treaty of Guadalupe Hidalgo]; and, until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the previous provisions of this act.

Act of July 22, 1854, ch. 103, § 8, 10 Stat. 308, 309 (1854). The Office of the Surveyor General also employed a presumption of a community land grant if there was proof that a town or village existed on the grant in 1846. Placido Gomez, comment, The History and Adjudication of the Common Lands of Spanish and Mexican Land Grants, 25 Nat. Resources J. 1039, 1069 (1985).

FACTS AND PROCEDURAL BACKGROUND

{7} On October 8, 1824, Salvador Montoya for himself and five other unnamed individuals petitioned the Mexican Constitutional Justice and Corporation of El Bado for a described tract of land to plant

corn and other crops. Following the customary protocols, the Constitutional Justice of El Bado placed Salvador Montoya and the other petitioners in judicial possession of the grant on April 23, 1825, and the Tecolote Land Grant was established, with its boundaries as set forth in the petition. Montoya and his companions established farmlands on a portion of the grant.

{8} On January 31, 1838, three different individuals, on behalf of themselves and twenty-four other named individuals petitioned the Honorable Constitutional Alcalde of El Bado to partition the original 1825 grant. At first the petition was denied, because the lands had already been granted to the Salvador Montoya petitioners and some of the lands were being used as commons for grazing. Asserting they needed farms to survive, the petitioners persisted, and asked that they be given at least the surplus lands that remained uncultivated. Eventually, they prevailed, and the local alcalde gathered the petitioners and their families and conducted a "reparto" to divide parcels of farmland among them. The 1838 Repartimiento that resulted divided the original 1825 grant into two parcels. In describing the land allotted to the petitioners, the 1838 Repartimiento referenced the "Wagon Road" as their southern boundary, and it recognized the remaining land to the south and southwest of the "Wagon Road" as in the possession and ownership of Salvador Montoya. Salvador Montoya died in 1840, and his son, Jose

Maria Montoya lived continuously on the property from 1839 until his death in 1905.

{9} On July 25, 1856, Hugh Smith, a Santa Fe attorney, addressed a petition to the Surveyor General, requesting confirmation of the Tecolote Land Grant on behalf of two different groups: (1) "The heirs of Salvador Montoya, deceased, for themselves"; and (2) "on behalf of the inhabitants of the [T]own of Tecolote." On December 21, 1856, the Surveyor General determined that the Tecolote Land Grant was good and recommended to Congress that it approve a community grant to the Town of Tecolote, reciting that "[i]t is a well known fact that the [T]own of Tecolote was in existence for some time previous to the cession of the country to the United States, and has continued in existence up to the present date."

{10} On December 22, 1858, the United States Congress confirmed the grant as a community grant to the Town of Tecolote. The Act of 1858 confirming the grant states:

> An Act to confirm the Land Claim of certain Pueblos and Towns in the Territory of New Mexico.
>
> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That. . . .
>
> . . . the claim . . . of the town of Tecolote in the county of San Miguel [having been] reported for the favorable action of Congress, by the said [Surveyor General] on the

> thirtieth of September, eighteen hundred and fifty-seven . . . to the Department of the Interior, be, and [is] hereby, confirmed; and the Commissioner of the Land-Office shall issue the necessary instructions for the survey of all of said claims, as recommended for confirmation by the said [Surveyor General], and shall cause a patent to issue therefor as in ordinary cases to private individuals: Provided, That this confirmation shall only be construed as a relinquishment of all title and claim of the United States to any of said lands, and shall not affect any adverse valid rights, should such exist. APPROVED, December 22, 1858.

Act of Dec. 22, 1858, ch. 5, 11 Stat. 374, 374 (1858) (emphasis added).

{11} Neither the Surveyor General recommendation nor the Congressional Confirmation recognized a private grant to Salvador Montoya or his son, Jose Maria Montoya.

{12} In August 1859, the Deputy Surveyor surveyed and mapped the boundaries of the Tecolote Land Grant, showing that the land grant encompassed an area of 21,637 acres. In December 1881, the Office of the Surveyor General re-surveyed the grant boundaries and determined that the Tecolote Land Grant actually consisted of 48,123 acres. The re-survey, which was filed for record in the Office of the Surveyor General in 1882, located the boundaries as initially set forth in the 1824 petition of Salvador Montoya and the five other unnamed individuals, and

defines the exterior boundaries of the Tecolote Land Grant as it currently exists. The lands that the 1838 Repartimiento described as being separated from the original grant are therefore included in the present Tecolote Land Grant.

{13} In 1885, three years after the second survey was filed showing the grant to consist of 48,123 acres, instead of 21,637 acres, attorney Thomas Catron filed a petition with the Commissioner of the General Land Office on behalf of himself and the heirs of Salvador Montoya for confirmation of the original 1824 grant as a private grant, notwithstanding that Congress had previously confirmed the land grant as a community grant to the Town of Tecolote in the 1858 Congressional Confirmation. The General Land Office rejected Catron's petition.

{14} Mr. Catron then appealed to the Secretary of the Interior. In a proceeding "On Appeal Before the Secretary of the Interior," entitled, "In the Matter of the Form of Patent of Private Land Claim Number Seven" Mr. Catron asserted that the patent should be issued to Salvador Montoya for himself and his unnamed five associates, and their heirs and assigns. Therein he recounted how Salvador Montoya, for himself, and five other individuals, "names not mentioned," obtained the land grant from the government of Mexico, and that the heirs of Salvador Montoya, deceased, for themselves and on behalf of the inhabitants of the Town of Tecolote had obtained confirmation of the land grant from the Surveyor General and then Congress under the 1854 Act. He

argued that "the remaining duties of the Commissioner and the Secretary of Interior are purely ministerial; merely to issue the patent to the person or persons to whom the grant was made, as evidenced by the original muniments of title." He asserted, "The grant was not made to any town, but was made to Salvador Montoya, and his five associates, whoever they may have been." Mr. Catron contended, "The government of the United States has no right to divest the title from Salvador Montoya and his heirs." He concluded:

> It cannot be questioned that upon the face of the original muniments of title, the legal title to this grant vested in Salvador Montoya, and his associates named, and that the intention of the Surveyor General was to approve the claim of these parties to this land, and the Act of Congress was intended as a confirmation of the claim and of the rights of the said parties to said grant, and the Commissioner, and Secretary of the Interior should preserve the status and rights of all parties in interest by following the language, or the substance of the language of the original title documents in issuing the patent to Salvador Montoya, and his heirs, and his associates and their heirs and assigns; and thereby leave all claims in the same position with respect to their legal rights as held by them under the Mexican Government prior to the change of sovereignty.

{15} On August 13, 1886, the Department of the Interior rejected Mr. Catron's petition, because "Congress with the whole record before it has confirmed said grant to the [T]own of Tecolote," and Congress intended to issue a community grant to the Town of Tecolote. The Department of Interior determined that the Patent should follow the provisions of the 1858 Congressional Confirmation, and that the Patent would be issued as a community grant.

{16} On June 21, 1902, the United States issued the Patent to the Town of Tecolote under the signature of President Theodore Roosevelt. The Patent itself recounts how Salvador Montoya for himself and five other individuals obtained the land grant from Mexico in accordance with its laws; how proceedings were conducted by the Surveyor General, who recommended that the grant be confirmed by Congress after finding, "It is a well known fact that the Town of Tecolote was in existence for some time previous to the cession of the Country to the United States and has continued in existence up to the present date"; that the claim was confirmed by Congress in the Act of December 22, 1858; and that the grant had been surveyed. The patent then conveys the land to the Town of Tecolote in the following language:

> Now Know Ye, That the United States of America in consideration of the premises and in accordance with the provisions of the aforesaid Act of Congress of the twenty[-]second day of December one thousand eight hundred and fifty[-]eight Has Given and Granted and

> by these presents Does Give and Grant unto the said Town of Tecolote the tract of land described and embraced in the foregoing survey; but with the proviso contained in the said act of Congress of the twenty-second day of December one thousand eight hundred and fifty-eight, That this patent shall only be construed as a relinquishment of all title and claim of the United States of any of said lands and shall not affect any adverse valid rights, should such exist. To Have and To Hold the said tract of land with the appurtenances unto the said Town of Tecolote its successors and assigns forever with the proviso aforesaid.

(Emphasis added.)

{17} Plaintiffs are some of the descendants of Salvador Montoya and his son, Jose Maria Montoya. In 1999, Plaintiffs initiated the present suit alleging ownership of land located entirely within the exterior boundaries of the Tecolote Land Grant. Plaintiffs claim that the 1825 Mexican land grant as adjusted by the 1838 Repartimiento, as well as adverse possession based on color of title from these Mexican documents, provide superior rights which entitle them to fee simple title of the disputed property. Defendants (Tecolote) are the corporate body and its board of directors established by the Territorial Government of New Mexico in 1903 under NMSA 1978, §§ 49-10-1 to -6 (1903, as amended through 1971) to manage and control the Tecolote Land Grant. They are the successor to the former Town of Tecolote.

{18} Following a non-jury trial, the district court entered findings of fact and conclusions of law and a "Final Judgment for Quiet Title" in favor of Plaintiffs. The district court found that Plaintiffs acquired title to 19,320 acres of the original 48,123 acres of the Tecolote Land Grant through the adverse possession of Salvador Montoya and his son Jose Maria Montoya from 1838 through 1902. The district court found that color of title was established by the valid land grant from the Mexican government in 1825, as adjusted by the 1838 Repartimiento.

{19} The district court ruled that Plaintiffs – as successors in interest to Salvador Montoya and his son Jose Maria Montoya – have superior title and "valid adverse rights" to the disputed property, which were not affected when Congress confirmed the community land grant and the United States Patent was issued to the Town of Tecolote. The district court viewed the "shall not affect any adverse valid rights" language in the 1858 Congressional Confirmation and the 1902 Patent as relinquishing only the rights of the United States to the property, but not those of any claimants holding "superior title." Specifically, the district court ruled that Plaintiffs have superior title, based on events that pre-dated the issuance of the 1902 Patent, to the disputed property on three bases: (1) by prior vested rights under Mexican law by virtue of the 1825 Mexican grant and the 1838 Repartimiento; (2) by statutory possession and fee simple title pursuant to NMSA 1978, § 47-1-25 (1953), repealed by Act of Apr. 2, 2007, ch. 266, 2007

N.M. Laws 3150 (rights of persons in possession under Spanish and Mexican grants); and (3) by adverse possession pursuant to NMSA 1978, § 37-1-21 (1979), repealed by 2007 N.M. Laws 3150. Tecolote appeals.

ANALYSIS

{20} Tecolote argues that the district court lacked jurisdiction to address Plaintiffs' claims. The question was preserved for our review by Tecolote's motion for summary judgment, which the district court denied, as well as by Tecolote's requested findings of fact and conclusions of law, which were rejected by the district court.

{21} The issue arises because of Tameling v. United States Freehold & Emigration Co., 93 U.S. 644 (1876). In Tameling, the Supreme Court declared that under the New Mexico Surveyor General Act, Congress did not grant courts with any authority to adjudicate land grant claims in the New Mexico Territory, and under Section 8 of the 1854 Act, the Surveyor General's report "was to be laid before Congress for such action as might be deemed just and proper." Tameling, 93 U.S. at 662. The Supreme Court therefore concluded that under the statute, "The final action on each claim reserved to Congress, is, of course, conclusive, and therefore not subject to review in this or any other forum." Id. Thus, Tameling holds that under the New Mexico Surveyor General Act, when Congress confirms a land grant, its

determination concerning the origin, nature, character, and size of a land grant is conclusive and is not subject to attack in a court or any other forum. See id. at 662-63. The Congressional Act in turn determines the status of a land grant under Article VIII of the Treaty of Guadalupe Hidalgo. The holding of Tameling, which we refer to as the Tameling bar, has been consistently followed and applied by the New Mexico Territorial Supreme Court and our own Supreme Court.

{22} Chavez v. Chavez de Sanchez, 7 N.M. 58, 32 P. 137 (1893) was an ejectment action in which the plaintiffs held title to land described in a homestead patent from the United States in 1889. Id. at 62, 32 P. at 137. The defendants who were heirs of purchasers from heirs of Nicolas de Chavez admitted they were in possession of a portion of the land described in the patent but asserted that the land was part of a perfect grant made to Nicolas de Chavez in 1739. Id. The evidence offered by the defendants to establish the existence of the Mexican grant to Nicolas de Chavez in 1739, was excluded by the district court. Id. at 68, 32 P. at 140. On appeal, the Territorial Supreme Court said the question presented was whether a land claim resting upon a grant from the Mexican government but which was never acted upon by the United States, or any tribunal created by the United States, to pass upon its validity could be superior to a claim of the same land that was based upon a patent from the United States. Id. at 65, 32 P. at 139. The plaintiff argued that even if the 1739 grant to Nicolas

de Chavez was perfect under the laws, usages, and customs of Spain and Mexico, evidence of the grant was properly excluded as irrelevant and incompetent because until a tribunal established by Congress for that purpose actually determined whether the grant was valid, the court lacked jurisdiction to determine its value. Id. The Territorial Supreme Court applied the Tameling bar and agreed with the plaintiff, holding that since the Spanish title papers that defendants relied upon were "not confirmed by [C]ongress, or by any tribunal authorized by [C]ongress to examine into and determine the validity of such titles in New Mexico, the papers offered in evidence tending to establish such Spanish title were properly rejected by the court." Chavez, 7 N.M. at 83, 32 P. at 145.

{23} H.N.D. Land Co. v. Suazo, 44 N.M. 547, 105 P.2d 744 (1940), involved common lands within the exterior boundaries of the Tierra Amarilla grant known as the El Paso Ranch. Id. at 548, 105 P.2d at 744. The grant was originally made by the Mexican government in 1832 "unto Manuel Martinez, together with eight sons and some others who voluntarily desire to accompany him." Id. (internal quotation marks omitted). Pursuant to the New Mexico Surveyor General Act, Congress confirmed and approved the grant as an individual grant to Francisco Martinez, an heir of the original grantee. Id. at 548-49, 105 P.2d at 745. Between 1861 and 1866, Francisco Martinez conveyed title to specific tracts of land to specific individuals but retained the right of "pastures, woods, water, lumbers, watering places, and

roads, common and free." Id. at 549, 105 P.2d at 745 (internal quotation marks and citation omitted). The successors in interest to these deeds asserted: "The clear intention of [Francisco] Martinez . . . was to reserve to all owners of allotted land within the grant, the free and undisturbed perpetual use of all the common and unallotted lands for the purpose of having for the common use, pasture, water, and roadways according to the custom existing in every settlement." Id. at 550, 105 P.2d at 746 (internal quotation marks omitted). They contended that the Tierra Amarilla grant was originally a community land grant from the Republic of Mexico, and that under the Treaty of Guadalupe Hidalgo, legal title to the common lands passed to the United States as part of a community land grant, impressed with the trust that they were reserved as common lands for use by the entire community. Id. at 550-51, 105 P.2d at 746. Further, they asserted that although by Congress's confirmation of the grant legal title passed to Manuel Martinez, "such title was at all times and still is impressed with this trust." Id. at 552, 105 P.2d at 747. The Supreme Court summarized the argument to be that "the courts will recognize, apply and enforce the terms of the grant and the Treaty of Guadalupe Hidalgo as applied to these lands; and, if the act of [C]ongress confirming the grant conflicts with or undertakes to ignore the provisions of the grant and the Treaty, the terms of the grant and the Treaty must prevail." Id. Applying the Tameling bar, the Supreme Court said:

> It is clearly and fully established . . . that until [C]ongress had passed on the validity of such land grant titles (either by act of confirmation, or by decree of a special tribunal created by it for that purpose) the courts are without jurisdiction to consider such a grant; and that after [C]ongress had so acted its action was conclusive and binding on the court. That is to say, in neither case could the courts themselves pass on the meaning, effect or validity of the grant itself being limited to a determination simply of the meaning of the act of [C]ongress confirming the grant.

H.N.D. Land Co., 44 N.M. at 552-53, 105 P.2d at 747.

{24} The Tameling bar has also been consistently applied and followed by the federal courts. For example, Martinez v. Rivera, 196 F.2d 192 (10th Cir. 1952), also involved the Tierra Amarilla land grant in the New Mexico Territory, which we have already noted, was confirmed by Congress as a private land grant pursuant to the New Mexico Surveyor General Act. Id. The plaintiffs, who owned large areas of land within the boundaries of the grant, succeeded in their action against members of the Board of County Commissioners of Rio Arriba County to restrain them from proceeding with a special election to elect a board of trustees of the land grant. The court said, "The duty of providing the mode for securing and establishing claims to Spanish and Mexican land titles and fulfilling the [T]reaty of Guadalupe Hidalgo developed upon the political department of the

government. Congress could either discharge that duty itself or delegate it to the judicial department," and that under the New Mexico Surveyor General Act, Congress reserved to itself the determination of those claims. Id. at 193-94 (footnote omitted). The court then noted that in a series of opinions beginning with Tameling, "the Supreme Court held that the action of Congress, when taken [pursuant to the New Mexico Surveyor General Act], was conclusive as to the validity and the character or nature of the grant, and was not subject to review by the Supreme Court of the United States or any other judicial tribunal." Martinez, 196 F.2d at 194. In this particular case, since Congress confirmed the grant without qualification or limitation as recommended by the Surveyor General, "[t]he confirmatory act of Congress is final and conclusive and this court may not go behind that act and determine the character or nature of the grant from the antecedent documents." Id. The order granting the injunction was therefore affirmed. Id.

{25} Sanchez v. J.T. Taylor, 377 F.2d 733 (10th Cir. 1967), involved the Sangre de Cristo Grant, which was also confirmed by Congress as an individual land grant under the New Mexico Surveyor General Act. Id. at 735. This case was factually very similar to H.N.D. Land Company, and it came to the same result. The defendants asserted, and it was admitted for purposes of summary judgment, that under Mexican law, settlers on the grant had certain rights in common on the lands of the grant such as

grazing and gathering wood. Sanchez, 377 F.2d at 736. The issue presented was whether these rights under Mexican law survived the acquisition of the land by the United States when Congress confirmed title of the grant to an individual person. Id. at 737. Applying the Tameling bar, the court held,

> We find no error in the trial court's conclusion that appellants, as a matter of law, have no rights in [the plaintiff's] land under Mexican law or the original grant. Any conflicting rights prior to the confirmatory Act of 1860 which might have arisen or existed by reason of the original grant from Mexico, considered in the light of Mexican law and the Treaty of Guadalupe-Hidalgo, were thereby extinguished.

Sanchez, 377 F.2d at 737.

{26} Plaintiffs assert that notwithstanding the Tameling bar, the district court had jurisdiction based on the specific reservation of third-party rights contained in the 1858 Congressional Confirmation and the 1902 Patent. As quoted above, both documents state that they "shall only be construed as a relinquishment of all title and claim of the United States to any of said lands, and shall not affect any adverse valid rights, should such exist." Based on this language, Plaintiffs contend that the district court had jurisdiction to decide their claims in this case. We disagree.

{27} This language reserving the rights of others was expressed in some form in all the acts of

Congress establishing tribunals to implement the Treaty of Guadalupe Hidalgo. Bd. of Trs. of Anton Chico Land Grant v. Brown, 33 N.M. 398, 403, 269 P. 51, 52 (1928) (hereinafter Brown). According to Rodrigues v. United States, 68 U.S. 582 (1 Wall.) (1863), this language was necessary because of the loose and indefinite manner in which grants made by the Mexican government were described, and the grants were not surveyed when they were made. Brown, 33 N.M. at 403, 269 P. at 52. Therefore, two or three grants may have been made for the same land or parts of the same land, which were then presented to Congress for confirmation. Id. This was the exact situation in Brown where Congress confirmed one Mexican land grant for specific property as a community grant and another Mexican grant for the same property as an individual grant. Id. at 398, 269 P. at 51. Thus, Brown was a dispute between two confirmed grantees and the language in the confirmation and patent gave the court jurisdiction to decide which confirmed grant was superior to the other. Id. at 404, 269 P. at 53. There is no dispute between the two confirmed grantees here.

[28] Apart from Brown, there is an additional reason why the third-party language in the Congressional Confirmation and Patent does not assist Plaintiffs. The petition filed by Mr. Catron with the Commissioner of the Land Office on behalf of himself and the heirs of Salvador Montoya to have the patent issued as a private grant although Congress had already confirmed the grant as a community grant

was rejected. Congress itself confirmed the grant as a community grant to the Town of Tecolote, and after administrative hearings and procedures, the Department of the Interior rejected the petition to convert the grant into a private grant. The United States Patent then followed the provisions of the 1858 Congressional Confirmation. In this case, Plaintiffs are challenging the origin, nature, character, and size of the Tecolote Land Grant by seeking a judicial determination that almost 20,000 acres in the Tecolote community land grant now belong to them. Under these circumstances, the third-party language in the Congressional Confirmation and Patent are not a grant of jurisdiction to the district court notwithstanding the Tameling bar. Plaintiffs are not "third parties" within the meaning of the Congressional Confirmation and Patent issued to Tecolote. Plaintiffs' predecessors were actual participants in the proceedings challenging the actions of the United States government and lost.

{29} In line with the foregoing reasoning, we also follow Beard v. Federy, 70 U.S. (1 Wall.) 478 (1865), which involved two different Mexican land grants of the same land. The Bishop of Monterey received a land grant from the Mexican government and after Congress confirmed the grant under the California Commissioner Act, the United States government issued its patent to the Bishop of Monterey. Id. at 481-82. The facts also showed that Pio Pico, a Mexican governor of California, made a grant of the same land to other individuals after Mexico

was invaded by the United States but before the jurisdiction and authority of the Mexican officers terminated. Id. at 483. However, neither this grant nor any claim founded upon the grant was ever submitted to Congress for confirmation. Id. at 484-85. The issue was whether the plaintiff, claiming title through the United States patent to the Bishop, or the defendant, who relied on the title derived under the deed of Governor Pico, was entitled to the property. Id. at 483. The Supreme Court said:

> The [California] [B]oard having acquired jurisdiction, the validity of the claim presented, and whether it was entitled to confirmation, were matters for it to determine, and its decision, however erroneous, cannot be collaterally assailed on the ground that it was rendered upon insufficient evidence. The rule which applies to the judgments of other inferior tribunals applies here, – that when it has once acquired jurisdiction its subsequent proceedings cannot be collaterally questioned for mere error or irregularity.

Id. at 489.

{30} The patent to the Bishop contained the same language as does the Patent in this case that it would not affect any adverse valid rights of third persons. Id. at 491. The defendant who claimed under the Governor Pico Grant therefore contended that the superior right as between the plaintiff and the defendant, who owned the land, was an open question as

though no proceedings for the confirmation had occurred and no patent for the land had been issued. Id. at 492-93. The United States Supreme Court rejected this argument stating, "The term 'third persons,' as there used, does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property." Id. at 493. Thus, the title held through the United States patent granted to the Bishop of Monterey was superior to the title derived from the deed of Governor Pico, and the defendant who claimed title under the Governor Pico grant was deemed to be a mere "intruder." Id. at 492-93. In Brown, our Supreme Court stated that after Beard, "it has been well established that confirmation is conclusive as against the United States and as against a mere intruder or one claiming a title originating under the United States subsequent to the change of sovereignty." Brown, 33 N.M. at 404, 269 P. at 53. Plaintiffs have the status of "mere intruder[s]" under these decisions instead of status of "third parties" under the Confirmation and Patent. Sanchez explains why:

> [E]ven if under Mexican law or the terms of the grant certain settlement rights which conflicted with the congressional confirmation had been given to third persons prior to the [Treaty of Guadalupe], the quit-claim clause would nevertheless be of no avail to

> appellants, because title had passed to the United States.

377 F.2d at 737.

{31} The three bases on which the district court judgment rests each require Plaintiffs to establish prior vested rights under Mexican law by virtue of the 1825 Mexican Grant and the 1838 Repartimiento or color of title pursuant to them. Plaintiffs acknowledge that the Tecolote Land Grant is a community grant and that the Town of Tecolote is the proper grantee, as set forth in the 1858 Congressional Confirmation and ensuing Patent. Plaintiffs argue they are not challenging the 1858 Congressional Confirmation or the 1902 Patent that followed and that they are not challenging the true origin, nature, character, size, or proper grantee of the Tecolote Land Grant. However, Plaintiffs argue that because they are asserting an adverse claim of superior title to a portion of the property within the grant, the Tameling bar does not apply. We reject this contention. By this action Plaintiffs seek to convert 19,320 acres of the original 48,123 acres of the Tecolote Land Grant into private property. Thus, Plaintiffs are seeking to alter the nature, character, and size of the Tecolote Land Grant. The Tameling bar is directly applicable and bars this action.

{32} The process chosen by Congress to determine the validity, character, and size of land grants held under the Mexican and Spanish governments, and then issuing United States patents to the owners

of the property, resulted in a final determination of land ownership of vast tracts of land that were ceded to the United States by the Treaty of Guadalupe Hidalgo. It provided the owners with security in the ownership of their property. The public policy favoring the finality of these determinations was articulated as follows by the United States Supreme Court in Beard:

> It is in this effect of the patent as a record of the government that its security and protection chiefly lie. If parties asserting interests in lands acquired since the acquisition of the country could deny and controvert this record, and compel the patentee, in every suit for his land, to establish the validity of his claim, his right to its confirmation, and the correctness of the action of the tribunals and officers of the United States in the location of the same, the patent would fail to be, as it was intended it should be, an instrument of quiet and security to its possessor. The patentee would find his title recognized in one suit and rejected in another, and if his title were maintained, he would find his land located in as many different places as the varying prejudices, interests, or notions of justice of witnesses and jurymen might suggest. Every fact upon which the decree and patent rest would be open to contestation. The intruder, resting solely upon his possession, might insist that the original claim was invalid, or was not properly located, and, therefore, he could not be disturbed by the patentee.

Id. at 492-93; see also Joplin v. Chachere, 192 U.S. 94, 104 (1904) (stating that a patent "enabled [the grantee], without other proof, to maintain his title in the tribunals of the country. Founded as it would have been upon a survey by the government, it would have removed the doubt as to the boundaries of the tract, which always arises where their establishment rests in the uncertain recollection of witnesses as to ancient possession . . . [and] proved to its possessor an instrument of quiet and security"); St. Louis Smelting & Ref. Co. v. Kemp, 104 U.S. 636, 641 (1881) (stating that "[i]t is this unassailable character [of the patent] which gives to it its chief, indeed its only, value, as a means of quieting its possessor in the enjoyment of the lands it embraces . . . being a means of peace and security, . . . [to avoid] constant and ruinous litigation.") To allow Plaintiffs to go behind the United States Patent, and do so almost one hundred years later, to argue that the Tecolote Land Grant had been divested of some of the property in the confirmed grant prior to the issuance of the Patent is exactly what the patent process is designed to prevent. The point of the Tameling bar is that courts should not have to do what Plaintiffs have asked this Court and the district court to do – analyze ancient Mexican documents under American law to ascertain whether they meet, for example, color of title requirements for adverse possession. Congress having already made that determination, we decline to overturn or modify its decision.

CONCLUSION

{33} The judgment of the district court is reversed and the matter is remanded to the district court with instructions to dismiss the complaint.

{34} IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

MICHAEL D. BUSTAMANTE, Judge

STATE OF NEW MEXICO
COUNTY OF SAN MIGUEL
FOURTH JUDICIAL DISTRICT

EDWARDO MONTOYA, ANTONIO MONTOYA, ESTEVAN MONTOYA, CARLOS MONTOYA, RICARDO MONTOYA, DANIEL MONTOYA, TOM GONZALES, and LEOPOLDO GONZALES,

Plaintiffs,

v. **No.: D-412-CV-9900322**

TECOLOTE LAND GRANT by and through TECOLOTE LAND GRANT BOARD OF TRUSTEES,

Defendants.

FINAL JUDGMENT FOR QUIET TITLE

(Filed Oct. 5, 2005)

THIS MATTER came before this Court in a trial on the merits on March 31, 2003 and April 1, 2 and 3, 2003, and this Court issued its Findings of Fact and Conclusions of Law on September 17, 2003, issued its Judgment and Order on November 3, 2003, and held hearings in this matter on June 14, 2005 and September 7.2005. In this Court's Findings and Conclusions, which were incorporated in the November 3, 2003 Judgment and Order by reference, this Court directed the Tecolote Land Grant Board of Trustees to fulfill its statutory obligations as set forth in Sections 49-10-1 through 49-10-6 NMSA as amended to recognize and confirm specific lands claimed by the Plaintiffs, directed the Plaintiffs to specify which lands are

being claimed as *bona fide* adverse holdings, and directed the Board of Trustees to recognize and confirm those *bona fide* adverse holdings. After having reviewed the survey prepared by Plaintiffs' surveyor Max Doak for the limited purpose of specifying by specific boundaries which lands are being claimed by Plaintiffs as *bona fide* adverse holdings, the Court hereby determines that the Doak survey dated June 13, 2005, plat date December 14, 2004, (which is incorporated herein by reference) adequately identifies by specific boundaries those specific lands that Plaintiffs claim as *bona fide* adverse holdings. This Court therefore grants Quiet Title in Plaintiffs as against the Tecolote Land Grant Board of Trustees for those specific *bona fide* adverse holdings as identified in the Doak survey, in accordance with the limitations set forth in this Judgment.

The Court therefore ORDERS that Plaintiffs' right, title and interest is quieted, confirmed and determined to be superior as against the Tecolote Land Grant Board of Trustees for that land identified in the June 13, 2005 (plat date December 14, 2004) Doak survey, excepting any lands located within the exterior boundaries that are platted or developed, or lands that were deeded by warranty deed from the Tecolote Land Grant Board of Trustees recorded prior to November 12, 1999.

Any existing access to, or utility right of way for, any and all of the excluded lands described above that existed as of the December 14, 2004 Doak survey is maintained and shall be considered an access, or

utility, easement, as respectively appropriate for the particular purpose, across Plaintiffs' *bona fide* adverse holding.

This Judgment does not determine or affect any title issues that might exist as between Plaintiffs and third parties who were not a party to this lawsuit.

This Final Judgment of Quiet Title may be recorded for record, along with the accompanying June 13, 2005 (plat date December 14, 2004) Doak survey, as legal description for statutory recording purposes of Plaintiff's title in that land identified in the June 13, 2005 (plat date December 14, 2004) Doak survey, as against any interest of the Tecolote Land Grant in such lands as set forth in the legal description.

IT IS SO ORDERED.

Dated this 3rd day of October, 2005

/s/ Daniel Sanchez
DANIEL A. SANCHEZ
District Court Judge

STATE OF NEW MEXICO
COUNTY OF SAN MIGUEL
FOURTH JUDICIAL DISTRICT COURT

EDWARDO MONTOYA, ANTONIO MONTOYA, ESTEVAN MONTOYA, CARLOS MONTOYA, RICHARDO MONTOYA, DANIEL MONTOYA, TOM GONZALES, AND LEOPOLDO GONZALEZ,

Plaintiffs/Counterdefendants,

vs. **No.: D-412-CV-9900322**

TECOLOTE LAND GRANT
by and Through TECOLOTE
BOARD OF TRUSTEES,

Defendants/Counterplaintiff.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed Sep. 17, 2003)

THIS MATTER having come for hearing in a Trial on the Merits on March 31, 2003, and April 1st, 2nd, 3rd, 2003, the Plaintiff's being present and represented by Dolan and Domenici, P.C., Counsel Pete V. Domenici, Jr., Esq. and Charles Larkins, Esq. The Defendant's being present and represented by Counsel Charles R. Thompson, Esq. The Court reviewed the pleadings, heard the testimony, evidence, presentations of Counsel viewed the exhibits and being otherwise informed finds and concludes as follows:

FINDINGS OF FACT

1. The Court has jurisdiction over the parties hereto and the subject matter hereof.

2. The land and real estate that is the subject of this action (the 'property in question') is situated entirely within the exterior boundaries of the Tecolote Land Grant, which was established and conveyed to Salvador Montoya and five other individuals by the Republic of Mexico in 1825, and confirmed by Act of Congress on December 22, 1858. (See Trial Exhibits 1, 9 and C.).

3. In 1903, the Territorial Government of New Mexico, by NMSA 49-10-1 through 49-10-6, established the Tecolote Land Grant as a corporate body under the administration and control of a Board of Trustees. (Plaintiffs' Exhibit 48).

4. Defendant Tecolote Land Grant is managed, controlled and governed pursuant to NMSA 1978 §49-10-1 through 49-10-6. Defendant Board of Trustees of the Tecolote Land Grant is properly constituted pursuant to said statutes.

5. The Board of Trustees of the Tecolote Land Grant has the authority to sue and be sued.

6. The exterior boundaries of the 'property in question' claimed by Plaintiffs are as follows: on the north by that portion of the existing northern boundary of the Tecolote Land Grant situated between the eastern edge of the right of way of Interstate 25 and the western edge of the right of way of the Burlington

Northern and Santa Fe Railroad line; on the east by the western edge of the Burlington Northern and Santa Fe Railroad line right of way from the point that said right of way intersects the northern boundary of the Tecolote Land Grant, southerly along said right of way to a point on said right of way that is immediately due north of the point where County Road B-27 enters the easterly right of way of the Burlington Northern and Santa Fe Railroad line, thence south from said point across the Burlington Northern and Santa Fe Railroad line right of way to the point where County Road B-27 enters the easterly right of way of the Burlington Northern and Santa Fe Railroad line, continuing southerly along County Road B-27 to the point where County Road B-27 intersects the Tecolote Creek, and continuing southerly along the Tecolote Creek to the point where the Tecolote Creek intersects the southern boundary of the Tecolote Land Grant; on the south by the southern boundary of the Tecolote Land Grant from the point that the Tecolote Creek intersects said southern boundary westerly along said southern boundary to the point that said southern boundary intersects Tres Hermanos Creek (the western boundary of the Tecolote Land Grant) westerly and north-westerly along said western boundary to the point where said western boundary intersects the eastern edge of the right of way of Interstate 25; on the west by the eastern edge of the right of way of Interstate 25 from the point that the western boundary of the Tecolote Land Grant (Tres Hermanos Creek) intersects the eastern edge of the right of way of Interstate 25 northerly

along said right of way to the point that the eastern edge of said right of way intersects the northern boundary of the Tecolote Land Grant, as shown on attached Exhibit A which is incorporated herein by reference. (See Trial Exhibits 78, 116 and 117, which are incorporated herein by reference, and as reflected in the trial testimony of Max Doak and the January 22, 2003 deposition of Joe Sisneros.) There are numerous tracts within these boundaries that are not the subject of the Plaintiffs' claims.

7. The land claimed by Plaintiffs within the described boundaries of the 'property in question' does not include any platted or developed lands, or lands that were deeded by warranty deed from the Tecolote Land Grant Board of Trustees recorded prior to November 12, 1999. (See Complaint of November 12, 1999, First Amended Complaint of March 11, 2003 and Testimony of Carlos Montoya).

8. Plaintiffs' claim of ownership to the 'property in question' is based upon:

a. The 1825 Grant to Salvador Montoya and others from the Mexican Government.

b. The 1838 Judicial Repartimiento of the Grant.

c. Statutory possession under § 47-1-25 NMSA 1978 comp. as amended.

d. Statutory possession under § 37-1-21 NMSA 1978 comp. as amended.

9. The Treaty of Guadalupe Hidalgo ensured the protection of the private real property belonging to Mexicans living in the conquered territories and any other properties that were acquired by Mexicans through contract.

10. Plaintiffs and their grantors and predecessors in interest had title for more than 60 years, from the period 1838 through 1902, were in legal possession upon said lands, in quiet and peaceful possession, and without being interrupted under color of title.

11. On October 8, 1824 Salvador Montoya, for himself and five other individuals, petitioned the Constitutional Justice and Corporation of El Bado for a grant of land with the following boundaries: On the north by the Cueva, on the South by the Puertecito de Las Gallinas, on the East by the Pueblo and on the West by the Canada de Tres Hermanos. (See Trial Exhibits 1 and G.)

12. On November 19, 1824 Bartolome Baca, the Political Chief, reported in favor of the grant, recommending that the land be distributed by the justice in fee simple title, with the boundaries as set forth in Salvador Montoya's Petition. (See Trial Exhibits 1 and G.)

13. On April 23, 1825 Tomas Sena, the Constitutional Justice of El Bado, placed the parties in Judicial Possession of the grant, as defined in the boundaries set forth in the Petition. (See Trial Exhibits 1 and G.)

14. The description of the land given in the 1825 Grant by the Mexican Government was of sufficient means to ascertain and identify the land conveyed.

15. On January 31, 1838, Rafael Benavides, Jose Miguel Garcia and Rafael Garcia, for themselves and 24 other individuals (the 27 petitioners) petitioned the Honorable Constitutional Alcalde of El Bado to partition the grant and give to them surplus farmlands at Tecolote "above those lands possessed by the citizens and which are already under cultivation," with the boundaries of the land requested described as: on the north, the Tecolote Hill; on the east, the boundary of the Las Vegas Grant; on the south, below the boundary of the aforementioned Montoya to the wagon road; and on the west, by La Canada de Tres Hermanos. (See Trial Exhibits 4 and H.)

16. On February 26, 1838, Alcaldes Manuel Antonio Baca and Bicente Ribera reported to the Governor that the land solicited by the 27 petitioners was already granted. (See Trial Exhibits 4 and H.)

17. On March 3, 1838 the 27 petitioners solicited the Senior Prefect of the First District of the Department of New Mexico to grant them lands as they had originally petitioned, "even though it was already donated by the Most Excellent Deputation of this Territory to those to whom it was adjudicated or granted." (See Trial Exhibits 4 and H.)

18. On April 16, 1838, Alcalde Don Manual Antonio Baca conducted a Repartimiento of the original grant, which allotted certain occupied parcels of farmland

among families that were in possession of lands north and northwest of the Carnino de los Carros. (See Trial Exhibits 4 and H.)

19. The Repartimiento of 1838 divided the original Montoya Grant along the Old Santa Fe Trail (Camino de los Carros), giving to the latter petitioners the farmland that they were already in possession of north and northwest of the Wagon Road, and recognized the Wagon Road as the southern boundary of the land granted to the 27 petitioners. (See Trial Exhibits 4, H, 74, 117 and testimony of expert historian John Baxter and surveyor Max Doak.)

20. The wording of the 1838 Repartimiento describing the southern boundary as "below the boundary of the aforementioned Montoya to the wagon road" was a "call to an adjoiner" that recognized the Montoya property as the southern boundary of the area requested by the 27 petitioners. (See Trial Exhibits 4, H, 74 and testimony of surveyor Max Doak.)

21. The 1838 Repartimiento confirmed and recognized the possession and ownership of Salvador Montoya to the remainder of the grant located to the south and southeast of the Wagon Road. (See Trial Exhibits 4, H, 74 and testimony of expert historian John Baxter and surveyor Max Doak.)

22. The Wagon Road, or Santa Fe Trail, as it traversed through the Tecolote Land Grant was substantially in the same location as Interstate 25 is today. (See Trial testimony of expert historian John Baxter, surveyor Max Doak and Carlos Montoya.)

23. At the time of the 1838 Repartimiento the boundary between the Las Vegas Grant and the Tecolote Grant was located further west than that boundary is currently placed, and was approximately one-halfway between the existing eastern boundary of the Tecolote Land Grant and Interstate 25. (See Trial Exhibit 118 and testimony of Max Doax.).

24. Salvador Montoya died in 1840. (See Trial Exhibits 16 and 17).

25. Jose Maria Montoya lived continuously on the Tecolote Land Grant from 1839 until his death in 1905. (See Trial Exhibits 12, 16, 20, 74 and 110 and testimony of expert historian John Baxter and Carlos Montoya).

26. The Treaty of Guadalupe Hildago was signed on February 2, 1848, ending the war between the United States of America and the United Mexican States.

27. On July 22, 1854, Congress established the offices of Surveyor-General of New Mexico, Kansas and Nebraska; Thirty-Third Congress, Sess. I, Ch. 103 (Defendant's Exhibit C-2)

28. The Congressional Act provided that it shall not affect "any valid adverse rights"; Thirty-Fifth Congress, Sess II, Ch. 5, 6, 1859 (Defendant's Exhibit C-1)

29. The Congressional confirmation of the Town of Tecolote as a community land grant consisted of confirmation of the Report of the Surveyor General in

1856, which recommended confirmation of the grant to the Town of Tecolote.

30. The United States Patent for the Community land grant was issued in 1902 and signed by President Theodore Roosevelt. (Defendant's Exhibit E).

31. In 1851 the Governor of the Territory of New Mexico appointed Jose Maria Montoya to the rank of Captain in the local militia (See Trial Exhibits 111 and 112.)

32. One duty of the Surveyor General was to investigate titles to land grants that originated under Spain and Mexico to determine their validity or invalidity. (See Trial Exhibit A.)

33. On July 25, 1856, Hugh N. Smith, a Santa Fe attorney, addressed a single petition to Surveyor General William Pelham requesting confirmation of the grant on behalf of two different groups: 1) "The heirs of Salvador Montoya, deceased, for themselves"; and 2) "on behalf of the inhabitants of the town of Tecolote." (See Trial Exhibits 8 and B.)

34. Hugh Smith's petition indicated that those inhabitants who lived in the town of Tecolote had "all settled and possessed their lands with the consent of the original grantees." (See Trial Exhibits 8 and B.)

35. On December 21, 1856, William Pelham, Surveyor General, determined that the Tecolote grant was good and valid, and he forwarded his recommendation for approval of the grant to Congress. (See Trial Exhibit E.)

36. On December 22, 1858, the United States Congress confirmed the grant "of the town of Tecolote" (11 Stat. 374) with the condition that the Confirmation "shall not affect any adverse valid rights should such exist" (See Trial Exhibits 9, 27, C and E.)

37. In August 1859 Deputy Surveyor John W. Garretson surveyed and mapped the boundaries of the Tecolote grant, producing a plat showing that the grant encompassed an area of 21,637 acres. (See trial Exhibit 11.)

38. Neither the Surveyor General nor the Department of the Interior confirmed his request for a private grant.

39. In 1885, attorney Thomas B. Catron, filed a petition on behalf of himself and the heirs of Salvador Montoya for confirmation of the original 1824 grant as a private grant. This petition was filed with the Commissioner of the General Land Office, and was rejected.

40. On August 13, 1886, The Department of the Interior, by N.L. Muldrow, Acting Secretary, rejected the Catron appeal, determining in his decision that the patent should follow the provisions of the confirmatory Act of Congress of 1858 and that the patent should issue as a community grant.

41 In 1870 Jose Maria Montoya marketed wool from 1,000 sheep. (See Trial Exhibit 74 and testimony of expert historian John Baxter.)

42. In 1878 the boundary between the Las Vegas Grant and the Tecolote Grant was corrected, with the surveyors relying upon testimony from, among others, Jose Maria Montoya. (See Trail Exhibit 12 and 118.) On October 10, 1879 Jose Maria Montoya deeded a strip of land to the Southern Pacific Railroad Company stretching along the east side of the grant. (See Trial Exhibits 13 and 74 and testimony of expert historian John Baxter.)

43. On September 20, 1880 Jose Maria Montoya successfully pursued an injunction against Manual Aragon and others for trespass on Montoya's lands and for illegally taking timber from Jose Maria Montoya's land near El Puertecito Piedregoso. (See Trial Exhibits 16 and 74 and testimony of expert historian John Baxter.)

44. In 1880 Jose Maria Montoya was assessed ownership of 700 sheep. (See Trial Exhibit 74 and testimony of expert historian John Baxter.)

45. In December 1881, Deputies McBroom and Taylor of the Surveyor General's Office resurveyed the grant boundaries and determined that the Tecolote Grant included 48,123 acres. Their survey was filed for record in the office of the Surveyor General, Santa Fe, New Mexico on December 9, 1882. (See Trial Exhibit 18.)

46.. The 1881 McBroom and Taylor located the original boundary calls as those boundaries were petitioned for by Salvador Montoya in 1824, namely the Cueva on the North, the Puertecito de Las Gallinas

on the South, the Pueblo on the East and the Canada de Tres Hermanos on the West. (See Trial Exhibit E and testimony of surveyors Max Doak and Joe Sisneros.)

47. The 1881 McBroom and Taylor survey defined the exterior boundaries of the Tecolote Land Grant as it currently exists. (See Trial Exhibit E and testimony of surveyor Max Doak.)

48. The exterior boundaries of the Tecolote Land Grant are readily identifiable and can be located on the ground. (See Testimony of Max Doak and January 22, 2003 deposition of Joe Sisneros.)

49. On May 4, 1883 Jose Maria Montoya prepared a Manifest Declaration for the possession of land, declaring that the land had been in his possession for a little more than 25 years and that he possessed a certain tract or piece of land situated in the county of San Miguel, Territory of New Mexico. This tract of land ran from the northern to southern boundaries of the recognized grant, and was bounded on the east by the mesa located near the eastern boundary of the grant, and on the west by the Tecolote River. This confirmed Jose Maria Montoya's possession, use and control of the eastern portion of the 'property in question.' (See Trial Exhibits 74 and 110 and Trial testimony of expert historian John Baxter.)

50. For more than 25 years prior to 1892, Jose Maria Montoya was in actual possession of, and controlled, the land south and southeast of the wagon road in the Tecolote Land Grant, he resided within

the area known as the "Montoya Ranch," and he utilized the area for planting corn, wheat, oats and various other crops, used the same area for pasturage, fenced a part of the same area and claimed the whole of it, which claim was generally recognized by all the people in that locality. (See Trial Exhibits 12, 17, 21 and 22.)

51. In 1885, Thomas Catron appealed to the Secretary of the Interior requesting that the Patent for the Tecolote Land Grant be issued to Salvador Montoya and his heirs, not to the Town of Tecolote. (See Trial Exhibits 36 and 74 and testimony of expert historian John Baxter.)

52. On March 6, 1896 Jose Maria Montoya, as sole owner and representative of the "Montoya Grant" granted to the United States Postal Telegraph Company the right to construct, maintain and repair a line of telegraph poles and lines close or adjacent to the right of way of the Atchison, Topeka and Santa Fe Railroad Company. (See Trial Exhibits 23 and 74 and testimony of expert historian John Baxter.)

53. On June 23, 1899, Jose Maria Montoya deeded to 10 individuals various parcels of land within the exterior boundaries of the Tecolote Land Grant located south and southeast of the Santa Fe Trail. (See Trial Exhibits EE1 through EE9 and testimony of Joe Herrera.)

54. The June 23, 1899 deeds from Jose Maria Montoya are recognized by the Tecolote Land Grant Board of Trustees as valid conveyances from Jose

Maria Montoya, and cover the property known as the "Montoya Ranch."

55. Pursuant to trial testimony of Board President Joe Herrera, on behalf of the Tecolote Land Grant Board of Trustees, the Grant claims no common lands within the boundaries of these properties. (See Trial Exhibits EE1 through EE9, testimony of Joe Herrera and Partial Stipulated Order and Judgment of May 2, 2003.)

56. Jose Maria Montoya utilized the entire area of the Tecolote Land Grant south and southeast of the Wagon Road for pasturage of sheep and livestock, and raising corn, wheat, oats and other various crops continuously from 1840 through 1902. (See Trial Exhibits 74, 116 and 117 and testimony of expert historian John Baxter, Carlos Montoya and Danny Montoya.)

57. Jose Maria Montoya continuously occupied and controlled the entire area of the Tecolote Land Grant south and southeast of the Wagon Road from 1840 through 1902. (See Trial Exhibits 12, 16, 20, 74, 110, 116 and 117 and testimony of expert historian John Baxter and surveyor Max Doak.)

58. The acts relied on to establish possession by Jose Maria Montoya were as distinct as the character of the land reasonably allows. (See Trial Exhibits 74, 116 and 117 and testimony of expert historian John Baxter, Carlos Montoya and Danny Montoya.)

59. The claim of Jose Maria Montoya to the entire area of the Tecolote Land Grant south and southeast of the Wagon Road was generally recognized by all of the people in that locality between 1840 and 1902. (See Trial Exhibits 74, 116 and 117 and testimony of expert historian John Baxter and Carlos Montoya.)

60. The claim of Jose Maria Montoya to the entire area of the Tecolote Land Grant south and southwest of the Wagon Road is generally historically recognized by, and known to, members Plaintiffs family and many other families that still live within the Tecolote Land Grant. (See Trial Exhibits 74, 116 and 117 and testimony of expert historian John Baxter and Carlos Montoya.)

61. The heirs of Salvador Montoya maintained continuous use, control and quiet enjoyment of certain lands within the Tecolote Land Grant south and southeast of the Wagon road from 1838 until 1902. (See Trial Exhibits 12, 16, 20, 74, 110, 116 and 117 and testimony of expert historian John Baxter and Carlos Montoya.)

62. On June 21, 1902 The United States of America issued a Patent to The Town of Tecolote, which explicitly states that the "patent shall only be construed as a relinquishment of all title and claim of the United States of any of said lands and shall not affect any adverse valid rights, should such exist." The Patent was filed for record in San Miguel County January 18, 1904. (See Trial Exhibits 27 and E.)

63. The Tecolote Land Grant Board of Trustees was established by act of the Territorial Government of New Mexico in 1903 (See Trial Exhibits 29.)

64. One of the powers and responsibilities of the Tecolote Land Grant Board of Trustees is to recognize and confirm by deed of conveyance all bona fide adverse holdings of real estate on the Tecolote land grant. (See Trial Exhibit 29.)

65. The Tecolote Land Grant Board of Trustees does not have a definition or interpretation, nor an understanding, of the adverse valid rights language contained within the 1858 Confirmation or the 1902 Patent. (See Trial Exhibits 71 and 73 and testimony of Joe Herrera.)

66. The Tecolote Land Grant Board of Trustees has not established a method to recognize and confirm adverse holdings of real estate within the Tecolote Land Grant. (See Trial Exhibits 71 and 73 and testimony of Joe Herrera.)

67. The Tecolote Land Grant Board of Trustees has never recognized any title to land within the Tecolote Land Grant based upon adverse claims or rights. (See Trial Exhibits 71 and 73 and testimony of Joe Herrera.)

68. The Tecolote Land Grant Board of Trustees has no method for conveying land to heirs for title to land that stems from a document that predates the Board's existence. (See Trial Exhibits 71 and 73 and testimony of Joe Herrera.)

69. The Tecolote Land Grant Board of Trustees has never made a conveyance of land to any of the Plaintiffs.

70. The Tecolote Land Grant Board of Trustees has not improved the common lands located within the exterior boundaries of the Tecolote Land Grant. (See Trial testimony of Joe Herrera and Carlos Montoya.)

71. The Tecolote Land Grant Board of Trustees has not fenced the common lands located within the exterior boundaries of the Tecolote Land Grant. (See Trial Exhibit 71 and testimony of Joe Herrera and Carlos Montoya.)

72. The Tecolote Land Grant Board of Trustees has never surveyed the common lands within the Tecolote Land Grant. (See Trial testimony of Joe Herrera.)

73. The Tecolote Land Grant Board of Trustees is not certain of the location of the common land it claims is part of the Tecolote Land Grant.(See Trial testimony of Joe Herrera.)

74. The Tecolote Land Grant Board of Trustees does not have a management plan for managing the common lands located within the exterior boundaries of the Tecolote Land Grant.

75. The general boundaries of the "property in question" sought by Plaintiffs can be identified and placed upon the ground by a surveyor. (See Trial Exhibits 78, 116 and 117 and testimony of Max Doax.)

76. The platted and developed lands that are located within the "property in question" and for which Plaintiffs do not seek title can be readily identified and placed upon the ground by a surveyor. (See Trial Exhibits 81, 82, 84, 85, 87 and 88 and testimony of Max Doax.)

77. The Montoya and Gonzales Plaintiffs are some of the bloodline heirs of Salvador Montoya and Jose Maria Montoya. (See Trial Exhibits 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 107, and 122 and testimony of Carlos Montoya.)

78. Salvador Montoya, Jose Maria Montoya and Andrea Montoya died intestate in San Miguel County.(See Trial testimony of Carlos Montoya.)

79. The descendants of Jose Maria Montoya that have continued to reside within the Tecolote Land Grant have continuously held themselves out as having a right to use the 'property in question' without permission from the Board of Trustees and without paying the Board of Trustees for removal of natural resources. (See Trial testimony of Carlos Montoya.)

80. Plaintiffs have conducted discussions with representatives of the Tecolote Land Grant Board of Trustees regarding the history and control of the 'property in question.' (See Trial testimony of Carlos Montoya.)

81. Representatives of Tecolote Land Grant Board of Trustees have informed Plaintiffs that the Plaintiffs'

lands lie within the portion of the Tecolote Land Grant south and southeast of Interstate 25. (See Trial testimony of Carlos Montoya.)

82. Defendants presented no evidence demonstrating that any claim by suit in law or equity was set up or made against Jose Maria Montoya for the lands in his possession at any time during the period of 1840 to 1903.

83. Defendants have abandoned their Affirmative Defense of adverse possession

84. Plaintiffs' claims for certain property within the exterior boundaries of the Tecolote Land Grant do not include any land grant property west/Northwest of 1-25, nor do they include any claims for property east of the Railroad tracks of the Burlington Northern Railroad (formerly the Atchison, Topeka and Santa Fe).

85. Plaintiffs have not submitted a complete genealogy confirming each of their claims of heirship from Salvador Montoya forward. (Plaintiffs' Exhibit 122).

86. Salvador Montoya had at least two sons, Jose Maria Montoya and Teodoro Montoya.

87. It was not made clear to this Court whether other living heirs of Salvador Montoya, other than the Plaintiffs exist, and nevertheless were unnamed in this case.

88. The area which is enclosed by the CADD red line purports to be that land claimed in this action by

the Plaintiffs, excluding platted and developed lands within that area.

89. Plaintiffs' Exhibit 78 contains a disclaimer stating "This is no way constitutes a boundary survey as no field survey has been performed".

90. Plaintiffs' Exhibit 78 does not present a description (by CADD drawing or otherwise), of the platted and developed lands within the red CADD line which are developed and platted lands which Plaintiffs do not claim in this case.

91. The removal of resources from the common lands for sale to third-parties requires, as a normal management procedure of the Board of Trustees, a contract with the Board of Trustees, with a certain percentage of the sales proceeds remitted to the Board of Trustees of the Tecolote Land Grant.

92. The contract procedures for removal of natural resources by heirs for sale to third-parties is a source of income for the Tecolote Land Grant

93. Common lands are not fenced so that heirs of the land grant may have unimpeded access to the common land.

94. The Board of Trustees of the Tecolote Land Grant has the authority to recognize and confirm by deed of conveyance all bona fide adverse holdings of real estate of the Tecolote Land Grant, and in this instance has failed to do so.

95. The Board of Trustees of the Tecolote Land Grant maintains books of record of transfers of property within the exterior boundaries of the grant. Upon application by an heir to have a piece of property within the grant recognized as being privately owned, the Board searches the records of the grant to assure that the heir has a proper chain of title to the property. If not, the application is refused. Plaintiffs' surveyor Maxwell Doak was not asked nor did he perform a field survey for the Plaintiffs to determine by metes and bounds the description of all common lands of the Tecolote Land Grant remaining within the 19,320 acres which are claimed by the Plaintiffs after excluding the privately owned parcels within the same 19, 320 acres.

96. On January 12, 2000, Eduardo Montoya, Sr., by Warranty Deed, deeded the property claimed in this lawsuit to the six Montoya brothers, Plaintiffs in this case.

97. The Defendant land grant does not have a metes and bounds description of the remaining common lands of The Tecolote Land Grant, either within or without the boundaries of the 19,320 acres claimed by the Plaintiffs.

98. Congressional confirmation of the Tecolote Land grant in December of 1858 included specific language recognizing valid adverse rights, however no provision was made for adjudication of those adverse claims.

99. Under the requirement of Section 49-10-5 NMSA 1978 as amended the Tecolote Board of Trustees is obligated to address bona fide adverse holdings of real estate on the Tecolote Land Grant.

100. The Tecolote Land Grant Broad has failed to address those adverse claims.

101. A complete showing of the heirs of Jose Maria Montoya and his brother, Theodoro Montoya, has not been produced. (Defendant's Exhibit Q - Plaintiffs' Answer to Defendant's Interrogatory No. 4.)

102. Plaintiffs' testified that there are probably numerous other living bloodline heirs of Salvador Montoya and his sibling(s) who are not Plaintiffs in this case.

Based upon these findings, the Court concludes as follows:

CONCLUSION OF LAW

1. The Court has jurisdiction over the parties hereto and the subject matter hereof.

2. The Fourth Judicial District Court for the County of San Miguel has jurisdiction to decide the adverse claims presented by the Plaintiffs that is based upon the specific language regarding valid adverse rights that is contained in the 1858 Act of Congress confirming the Tecolote Land Grant and the 1902 U.S. Patent issued to the Town of Tecolote.

3. The Plaintiffs have superior title to the subject some of the property in question' as against the Tecolote Land Grant Board of Trustees through superior title originating under Mexican Law.

4. The Plaintiffs have superior title to "some of the subject property in question' as against the Tecolote Land Grant Board of Trustees through statutory possession under 07-1-25 NMSA 1978 comp. as amended.

5. The Plaintiffs have superior title to some of the subject 'property in question' as against the Tecolote Land Grant Board of Trustees through statutory possession under § 37-1-21 NMSA 1978 comp. as amended

6. Plaintiffs have not established that they are the sole surviving descendants, and the only heirs of Salvador Montoya.

7. Plaintiffs, and their predecessors in title, acquired the land and real estate described as the 'property in question' by virtue of a valid grant from the Mexican Government in 1825.

8. Plaintiffs' ancestor, Jose Maria Montoya, had valid adverse rights to the "property in question" based upon title stemming directly from a valid grant to Salvador Montoya by the Mexican Government in 1825, as adjusted by the 1838 Repartimiento.

9. The 1838 Repartimiento legal adjudication under Mexican law by the officials of San Miguel Del Bado

adjudicated and resolved competing claims for land within the Tecolote Land Grant.

10. The 1838 Repartimiento divided the original Tecolote grant into two separate grants.

11. The 1838 Repartimiento recognized the Wagon Road as the boundary between the two grants.

12. The boundaries of the property assigned to the latter petitioners by the 1838 Repartimiento were the Tecolote Hill on the north, the boundary of the Las Vegas Grant on the east, the Wagon Road on the south, and La Canada de Tres Hermanos on the west, which boundaries can be ascertained on the ground.

13. Plaintiffs' title and their predecessors' in tittle, interest title to certain land and real estate was granted to Plaintiff's predecessor in title by the Mexican Government in 1825 was confirmed by, and the boundaries to the land granted were adjusted through, the 1838 "Repartimiento" legal adjudication.

14. The Plaintiff's, and their predecessors' in title, prior vested rights under the former Mexican sovereign, as adjusted and confirmed in the 1838 Repartimiento, carried over to the new U.S. sovereign and are protected under the Treaty of Guadalupe Hidalgo, the 1858 U.S. Confirmation and the 1902 U.S. Patent

15. Jose Maria Montoya had color of title to lands within the Tecolote Land Grant located south and southeast of the Wagon Road.

16. Jose Maria Montoya was not a tenant in common with other members of the Tecolote Land Grant prior to 1903.

17. Jose Maria Montoya was in legal and quiet and peaceful possession of "to certain of the properties in question" continuously without being interrupted from 1840 until 1902.

18. Jose Maria Montoya had for more than 60 years, from the period 1840 through 1902, possessed the 'certain properties,' and his possession was continuous and uninterrupted with the exercise of complete dominion over 'certain properties', together with manifestation of ownership.

19. The actions of Jose Maria Montoya during the period of 1840 through 1902 were of sufficient character to have put all others on notice of his open, exclusive, uninterrupted, notorious, hostile and adverse possession of the 'certain properties.'

20. Jose Maria Montoya established fee simple title to the 'certain properties' by meeting the elements of statutory possession under the territorial laws of New Mexico now codified as §47-1-25 NMSA 1978 comp. as amended, and obtained fee simple title to the lands granted to Salvador Montoya by the Mexican Government in 1825, and as adjusted by the "Repartimiento" of 1838.

21. The December 22, 1858 Congressional Confirmation and the July 21, 1902 Patent to the Town of Tecolote did not effect the title to the land certain

held by Plaintiffs' predecessor in interest at the time of those congressional actions, which title was adverse to the Town of Tecolote.

22. The 1858 Congressional Confirmation and the 1902 U.S. Patent did not affect Plaintiffs' ancestor's valid adverse rights.

23. Title claimed by the Board of Trustees for the Tecolote Land Grant originates with the December 22, 1858 Confirmation, and it is from that date that any statutory adverse possession and statute of limitations against the Land Grant began to run.

24. It was not the function of the Surveyor General or the U.S. Congress to determine and adjudicate any existing valid adverse rights within the exterior boundaries of a land grant.

25. The Congressional purpose behind creating means whereby land grants were to be confirmed was to determine what lands belonged to the United States by segregating such as had become, under the former sovereignty, private property; not to adjudicate, nor to provide for the adjudication, of conflicting private claims. *Board of Trustees of Anton Chico Land Grant v. Brown*, 33 N.M. 398, 403-404 (1928).

26. Confirmation is legislative recognition of valid grants and is a quitclaim of U.S. interests in lands within grants. Confirmation operate[s] as an authoritative recognition of the record and validity of the ancient possession and title. *Catron v Laughlin*, 11 N.M. 604 (1903).

27. The confirmation by . . . Congress of a claim originating under the Spanish government, to a particular tract, carried title thereto without a survey or patent. *Langdeau v. Hanes*, 21 Wall. 521 (1874); *Joplin v. Chachere*, 192 U.S. 94, 48 L. Ed. 359, 24 S. Ct. 214 (1904); *Enrique del Pazo Y Marcos, et al. v. Wilson Cypress Co.*, 269 U.S. 82, 89, 46 S.Ct 57, 59 (1925).

28. A confirmation is a conveyance of an estate or right in lands to one who has the possession or some estate therein. [When] the tract confirmed appears to have had clearly defined boundaries, or to have been at least capable of identification, the confirmation perfected the claimant's title. A subsequent patent would only have served as documentary evidence of that title. *Morrow v. Whitney*, 95 U.S. 551 (1877).

29. There are numerous cases in the history of the country where Congress, after confirming parties title to lands, has directed that patents of the United States should be issued to them; yet, it has been held that the patent in such cases operated merely as record evidence of the title, and added nothing to the title itself. *Wright v. Roseberry*, 121 U.S. 488 (1887).

30. "A patent [is] an evidence of title and an instrument which, when issued "upon the confirmation of a claim of a pre-existing title," is simple "documentary evidence" of that title. *Territory of New Mexico v. Delinquent Tax List*, 12 N.M. 62, 73 P. 621 (1903).

31. The patent operate[s] only as convenient documentary proof of the original grant, and of its subsequent ratification by congress, on the terms therein expressed. *Gildersleeve v. New Mexico Mining Co.* 6 N.M. 27, 27 P. 318 (1891).

32. A patent is merely evidence of a grant; it adds nothing to the grantee's rights, but only furnishes him with convenient proof thereof" *Marsh v. Nichols, Shepard and Co.*, 128 U.S. 605, 32 L. Ed. 538, 9 S. Ct. 168 (1888).

33. Delay or lapse of time alone does not constitute laches or work an estoppel. *Galef v. Buena Vista Dairy*, 117 N.M. 701, 705, (Ct. App. 1994).

34. The party asserting the defense [of laches] must demonstrate prejudice, and for such purposes, prejudice cannot be inferred merely from the passage of time. *Brown v. Taylor*, 120 N.M. 302, 901 P.2d 720 (1995).

35. It is not enough to show merely an unreasonable delay to establish the defense [of laches], the evidence must show both that the delay was unreasonable and that it prejudiced the defendant. *Butcher v. City of Albuquerque*, 95 N.M. 242, 620 P.2d 1267 (1980).

36. Lapse of time alone does not necessarily imply an unreasonable delay in bringing suit, but it must appear that the delay worked to the injury of another. Thus, unreasonable delay embraces two elements of laches – lapse of time and injury or prejudice." *Thomas v. Pigman*, 77 N.M. 521, 424 P.2d 799 (1967).

37. Continuous and uninterrupted possession with the exercise of complete dominion, together with manifestation of ownership under color of title for the requisite length of time, establishe[s] title in the possessor. *Hoskins v. Talley*, 29 N.M. 173, 220 P. 1007 (1923); *Marquez v. Padilla*, 77 N.M. 620, 426 P.2d 593 (1967).

38. Where plaintiff's right of action is based upon adverse possession of land within land grants, and where such possession has been shown for ten years, under section 3364, Code 1915, (now codified as § 37-1-21 NMSA 1978) the possessor holding by virtue of a deed of conveyance, or other grant purporting to convey an estate in fee simple, and no claim by suit in law or equity, effectually prosecuted, shall have been set up or made to said lands within said period, then the person or persons so holding adverse possession shall be entitled to keep and hold the land in preference to all and against all. *First Nat'l Bank v. Town of Tome*, 23 N.M. 255, 270, 167 P. 733 (1917).

39. The requirements of adverse possession largely depend upon the situation of the parties, the size and extent of the land, and the purpose for which it is adapted; the acts relied on to establish possession must always be as distinct as the character of the land reasonably admits of, and must be so exercised as to acquaint the owner, should he visit it, that a claim of ownership adverse to his title is being asserted. *Lopez v. Barboa*, 80 N.M. 338, 455 P.2d 842 (1969); *Marquez v. Padilla*, 77 N.M. 620, 426 P.2d 593 (1967).

40. To constitute an adverse possession there need not be a fence, building, or other improvement made; it sufficing, for this purpose, that visible and notorious acts of ownership be exercised, for the statutory period, after an entry under claim and color of title. The uses to which the property can be applied, or to which the owner, or claimant, may choose to apply it, the nature of the property, and its situation are largely controlling factors in determining what acts of ownership might be considered requisite to the assertion of an adverse claim. *Baker v. Trujillo De Armijo*, 17 N.M. 383, 128 P. 73, 75 (1912); *Merrifield v. Buckner*, 41 N.M. 442 (1937).

41. Title to common and unalloted lands of a community grant can be acquired by adverse possession. *H.N.D. Land Co. v. Suazo et al.*, 44 N.M. 547, 105 P.2d 744 (1940); *L Bar Cattle Co. v. Board of Trustees*, 46 N.M. 26, 120 P.2d 432 (1941).

42. The governing body of a grant is a creature of the Legislature, and has only such powers as are conferred by the particular act creating it. *Board of Trustees of Las Vegas v. Montano*, 82 N.M. 340, 343, 481 P.2d 702, 705 (1971).

43. Until the adoption of Chapter 354, Section 1, Laws of 1979, Section 47-1-21, NMSA 1978 comp. as amended, relating to adverse possession in, to and upon Spanish and Mexican land grants, did not require that Plaintiffs and their predecessors in title pay property taxes for the land and real estate that is the subject of this action, and their title and

ownership by adverse possession vested and ripened before the amendment made by Chapter 354, Section 1, Laws of 1979, as aforesaid, and any failure by Plaintiffs or their predecessors in interest prior thereto to pay property taxes for the entirety of the land and real estate that is the subject of this action is therefore irrelevant and immaterial, and neither affects nor diminishes their acquisition of title by adverse possession, as decided in *Marquez v. Padilla*, 77 N.M. 620, 623, 426 P.2d 593 (1967), *Christmas v. Cowden*, 44 N.M. 517, 530, 105 P.2d 484 (1940) and *Jackson v. Gallegos*, 38 N.M. 211, 219, 30 P.2d 719 (1934).

44. If the description of the premises given in a deed affords sufficient means of ascertaining and identifying the land intended to be conveyed, it is sufficient to sustain the conveyance. The test is whether or not the intention of the parties can be discovered and effectuated. *Marquez v. Padilla*, 77 N.M. 620, 624, 426 P.2d 593 (1967); *Romero v. Garcia*, 89 N.M. 1, 546 P.2d 66, (1976).

45. The Tecolote Land Grant Board of Trustees is statutorily obligated to recognize and confirm such valid adverse rights that existed in Jose Maria Montoya at the time the Tecolote Land Grant Board of Trustees was established in 1903.

46. The Tecolote Land Grant Board of Trustees has not performed its statutory duty "to recognize and confirm by deed if conveyance all bona fide adverse holdings of real estate on the Tecolote land grant."

47. The Plaintiffs' interest in, and right to, the 'property in question' has descended through intestate succession from Jose Maria Montoya, through each successive generation, to some the current Plaintiffs.

48. There are unknown heirs that have not been identified that may have a legitimate claim or interest in the subject lands and any claim or adjudication made herein may not affect their interests if any.

49. While recognizing that the Plaintiffs have a valid and legitimate claim to certain lands and their boundaries, this Court is not clear on the specific boundaries of said lands that are being claimed by the Plaintiffs.

50. The Tecolote Land Grant Board of Trustees has failed in its obligation to address and recognize and confirm valid adverse holdings of real estate within the Tecolote Land Grant.

This Court directs the Tecolote Land Grant Board of Trustees to fulfill its statutory obligations as set forth in Sections 49-1-1 through 49-1-18 N.M.S.A. as amended and recognize and confirm specific lands claimed by the Plaintiffs.

The Plaintiffs are directed to specify which lands are being claimed as *bona fide* adverse holdings and the Board of Trustees are directed to recognize and confirm those *bona fide* holdings.

This Court retains jurisdiction over this matter and will set this matter for final review after the

parties have fulfilled their obligation under this order. A progress or status conference will be set in this matter in approximately ninety (90) days.

Dated this 12th day of September, 2003.

/s/ Daniel Sanchez
DANIEL A. SANCHEZ,
District Judge

STATE OF NEW MEXICO
COUNTY OF SAN MIGUEL
FOURTH JUDICIAL DISTRICT COURT

EDWARDO MONTOYA, ANTONIO MONTOYA, ESTEVAN MONTOYA, CARLOS MONTOYA, RICARDO MONTOYA, DANIEL MONTOYA, TOM GONZALES, and LEOPOLDO GONZALES,

Plaintiffs,

v.

TECOLOTE LAND GRANT by and through TECOLOTE BOARD OF TRUSTEES,

Defendants.

No.: D-412-CV-9900322

PARTIAL STIPULATED ORDER AND JUDGMENT

(Filed May 2, 2003)

HAVING HEARD the stipulation of the parties, IT IS ORDERED that: 1) the trespass claims of Plaintiffs are dismissed with prejudice; and 2) the Plaintiffs (or their subsequent grantees) have title as against the Defendant Tecolote Land Grant for the property more commonly known as the "Montoya Ranch" as described in the Defendant's Exhibits EE-1 through EE-9, attached hereto as Exhibit A. This Judgment does not give title to Plaintiffs (or their subsequent grantees) for any land within the

"Montoya Ranch" that is platted or developed or which has title originating in a deed, "Documento", or other form approved by the Tecolote Land Grant Board of Trustees recognizing title in any other person or entity that was recorded prior to November 12, 1999.

This Partial Stipulated Order and Judgment does not resolve any other issues in this case.

IT IS SO ORDERED.

DANIELA SANCHEZ
DISTRICT COURT JUDGE

Respectfully submitted:

/s/ Pete V. Domenici, Jr.
Pete V. Domenici, Jr., Esq.
Attorneys for Plaintiffs

/s/ Charles R. Thompson
Charles R. Thompson, Esq.
Attorney for Defendant

BY AUTHORITY OF CONGRESS.

THE

Statutes at Large and Treaties,

OF THE

UNITED STATES OF AMERICA,

FROM

DECEMBER 3, 1855, TO MARCH 3, 1859,

AND

PROCLAMATIONS SINCE 1791,

Arranged in Chronological Order;

WITH

REFERENCES TO THE MATTER OF EACH ACT AND TO THE SUBSEQUENT ACTS ON THE SAME SUBJECT.

EDITED BY

GEORGE MINOT AND
GEORGE P. SANGER, ESQUIRES.

COUNSELLORS AT LAW.

The rights and interest of the United States in the stereotype plates from which this work is printed are hereby recognized, acknowledged, and declared by the publishers, according to the provisions of the joint resolution of Congress, passed March 3, 1845.

VOL. XI.

THIRTY-FIFTH CONGRESS. SESS. II. CH. 5, 6, 1859.

Dec. 22, 1858.

CHAP. V. – *An Act to confirm the Land Claim of certain Pueblos and Towns in the Territory of New Mexico.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Pueblo land claims in the Territory of New Mexico designated in the corrected lists as –

A, Pueblo of Jemes in the county of Santa Ana,

B, Pueblo of Acoma in the county of Valencia,

C, Pueblo of San Juan in the county of Rio Ariba,

D, Pueblo of Picuris in the county of Taos,

E, Pueblo of San Felipe in the county of Bernalillo,

F, Pueblo of Pecos in the county of San Miguel,

G, Pueblo of Cochiti in the county of Santa Ana,

H, Pueblo of Santo Domingo in the county of Santa Ana,

I, Pueblo of Taos in the county of Taos,

K, Pueblo of Santa Clara in the county of Rio Ariba,

L, Pueblo of Tesuque in the county of Santa Fe,

M, Pueblo of San Ildefonso in the county of Santa Fe,

N, Pueblo of Pojuaque in the county of Santa Fe, reported upon favorably by the surveyor-general of New Mexico, in his report of the thirtieth of September, eighteen hundred and fifty-six, to the Department of the Interior, and the claim designated as –

O, Pueblo of Zia in the county of Santa Ana,

P, Pueblo of Sandia in the county of Bernalillo,

Q, Pueblo of Isleta in the county of Bernalillo,

R, (supposed,) Pueblo of Nambe, reported upon favorably by the said surveyor-general, on the thirtieth of November, eighteen hundred and fifty-six.

Also, the claim –

Number seven, of the town of Tecolote in the county of San Miguel,

Number eleven, of the town of Chilili in the county of Bernalillo,

Number thirteen, of the town of Belen in the county of Valencia, reported for the favorable action of Congress, by the said surveyor-general on the thirtieth of September, eighteen hundred and fifty-seven; also the claim number two of the town of Tomé reported upon favorably by the surveyor-general of New Mexico in his report of the thirtieth of September, eighteen hundred and fifty-six, to the Department of the Interior; also the claim number twenty-nine of the

town of Casa Colorado, reported upon favorably by the surveyor-general of New Mexico in his report of thirty-first December, eighteen hundred and fifty-six to the Department of the Interior, be, and they are hereby, confirmed; and the Commissioner of the Land-Office shall issue the necessary instructions for the survey of all of said claims, as recommended for confirmation by the said surveyor-general, and shall cause a patent to issue therefor as in ordinary cases to private individuals: *Provided*, That this confirmation shall only be construed as a relinquishment of all title and claim of the United States to any of said lands, and shall not affect any adverse valid rights, should such exist.

APPROVED, December 22, 1858.

Jan. 12, 1859.

CHAP. VI. – *An Act making Appropriations for the Support of the Military Academy for the Year ending the thirtieth of June, eighteen hundred and sixty.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and the same are hereby appropriated, out of any money in the treasury not otherwise appropriated, for the support of the Military Academy for the year ending the thirtieth of June, eighteen hundred and sixty:

For pay of officers, instructors, cadets, and musicians, one hundred and fifteen thousand seven hundred and eighty-six dollars.

LIMITATIONS OF ACTIONS

N.M. Stat. Ann. (1978)

§ 37-1-21. Real property held under governmental deed, devise or grant; ten years possession confirms title; exception for persons under disability.

In all cases where any person or persons, their children, heirs or assigns, shall have had possession for ten years of any lands, tenements or hereditaments which have been granted by the governments of Spain, Mexico or the United States, or by whatsoever authority empowered by said governments to make grants to lands, holding or claiming the same by virtue of a deed or deeds or [of] conveyance, devise or grant purporting to convey an estate in fee simple, and no claim by suit in law or equity effectually prosecuted shall have been set up or made to the said lands, tenements or hereditaments, within the aforesaid time of ten years, then and in that case, the person or persons, their children, heirs or assigns, so holding possession as aforesaid, shall be entitled to keep and hold in possession such quantity of lands as shall be specified and described in his, her or their deed of conveyance, devise, or grant as aforesaid, in preference to all, and against all, and all manner of person or persons whatsoever; and any person or persons, their children or their heirs or assigns, who shall neglect or who have neglected for the said term of ten years, to avail themselves of the benefit of any title, legal or equitable, which he, she or they may have to any lands, tenements or hereditaments,

within this state, by suit of law or equity effectually prosecuted against the person or persons so as aforesaid in possession, shall be forever barred, and the person or persons, their children, heirs or assigns so holding or keeping possession as aforesaid for the term of ten years, shall have a good and indefeasible title in fee simple to such lands, tenements or hereditaments; provided, however, that the person or persons claiming possession, his predecessors or grantors of such lands, tenements or hereditaments shall have for the period mentioned in this section continuously paid all state, county and municipal taxes which during the ten-year period have been assessed against the property; provided, further, that if any person entitled to commence or prosecute such suit or action is or shall be, at the time the cause of action therefor first accrued, imprisoned, of unsound mind, or under the age of majority, then the time for commencing such action shall in favor of such persons be extended so that they shall have one year after the termination of such disability to commence such action; but no cumulative disability shall prevent the bar of the above limitation, and this proviso shall only apply to those disabilities which existed when the cause of action first accrued and to no other.

N.M. Stat. Ann. (1978)

§ 47-1-24. [Rights of transferee of reversion.]

The assignee of or any successor to the right of reentry, forfeiture and reversion for breach or violation of condition or conditions subsequent, is hereby given upon such assignment, all of the rights and privileges of the original grantor for the enforcement of reentry, forfeiture and reversion when any such condition or conditions subsequent shall have been breached or broken, including all legal and equitable remedies for the judicial enforcement of such right or rights.

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§ 47-1-25. [Rights of persons in possession under Spanish and Mexican grants.]

Every person or persons being of the class or condition that have held or hold, in lawful possession under a legitimate title, derived from the authorities of Spain or Mexico, which, according to the laws at that time, had legitimate authority to grant such title to property, upon whatever lands belonging to said governments, prior to the treaty of peace by the latter with the United States, who actually find themselves in legal possession upon said lands, in quiet and peaceful possession, and without being interrupted, from the time that the government of the United States comprised within its limits this state; the said persons are entitled to a lawful claim of property and legal ownership under the limits

thereof, to the lands mentioned, in the same manner as those who had acquired by purchase, inheritance or legal conveyance, be the same whatever it may, according to law, exclusively and against any other person whatsoever, who lay claim subsequent to that date.

VICENTA MONTOYA, Plaintiff,
vs.
UNKNOWN HEIRS OF FRANCISCO MONTES VIGIL, Deceased; THE UNKNOWN HEIRS OF JUAN GONZALES, Deceased, AND ALL UNKNOWN OWNERS OF THE REAL ESTATE HEREINAFTER DESCRIBED,
Defendants, Appellants,
CANDIDO G. GONZALES, et als.,
Intervenors, Appellees

No. 1325
SUPREME COURT OF NEW MEXICO
16 N.M. 349, 120 P. 676
September 01, 1911

Appeal from the District Court for Bernalillo County, before Ira A. Abbott, Associate Justice.

SYLLABUS

SYLLABUS (BY THE COURT)

1. Under Section 3182, Compiled Laws 1897, the owner of the whole or any part of the premises sought to be partitioned may, whatever the origin of his title, intervene for the settlement of his rights.

2. A judgment in a partition suit which declares the rights of the parties and orders partition, is interlocutory only and is under the control of the court until final decision, and may be modified or rescinded at any time prior to final judgment or decree.

3. Section 2937, Compiled Laws of 1897, construed, and held to grant affirmative relief in the nature of a fee simple or statutory title in addition to the bar of the statute, in favor of persons being in possession of tracts of land within the boundaries of Spanish or Mexican land grants, for 10 years under a deed or deeds of conveyance, devise, grant, or other assurance purporting to convey an estate in fee simple upon compliance with the terms of the section, and possession of any part of the tract thus conveyed extends to the exterior boundaries of the lands described in such conveyance.

4. That Section 2937, supra, was enacted by the Legislature as a statute of repose for the purpose of settling the titles and preserving the rights of the pioneer settler who in good faith settled upon, improved, and cultivated vacant lands of the Spanish and Mexican grants within the territory, the ownership of which was unknown.

5. Section 2938 does not purport to confer fee simple title as is provided for in Section 2937, but simply raises the bar of the statute against the bringing of actions for the possession of lands held adversely for ten years under color of title and with payment of taxes, and is inapplicable to the present case.

6. The doctrine of mixed possession as laid down in Hunnicutt v. Peyton, 102 U.S. 333, 26 L. Ed. 113, examined and held to be inapplicable.

COUNSEL

Alonzo B. McMillen for Appellants.

* * *

JUDGES

McFie, J.

AUTHOR: M'FIE

OPINION

STATEMENT OF FACTS.

This action was brought for the partition of the entire Alameda land grant, situated in the counties of Bernalillo and Sandoval. The complaint was filed on the 12th day of June, 1906, and the defendants in the suit were designated as follows: "The unknown heirs of Francisco Montes Vigil, deceased, the unknown heirs of Juan Gonzales, deceased, and all unknown owners of the real estate hereinafter described," and the grant is described as follows: "A tract of land known as the 'Alameda Land Grant,' bounded on the north by the ruins of an old pueblo, on the south a small hill which was the boundary of Luis Garcia, on the east by the Rio Del Norte as it ran in the year 1710 near the eastern foothills, and on the west a prairie and hills, and containing, according to the official survey thereof, 89,346 acres of land, as will more fully appear from the record of said survey on file in the office of the Surveyor General of New Mexico, reference to which is made for more particular description." The complaint further alleges that

the grant was made by authority of the King of Spain to Francisco Montes Vigil in consideration of military services rendered on the 2nd day of January, 1710, juridical possession being given on January 27th, 1710. That Vigil sold and conveyed the grant to Captain Juan Gonzales on the 18th day of July, 1712, the conveyance being approved by the Governor and Captain General on the 18th day of September, 1713. The complaint further alleges that the grant was afterwards confirmed by the Court of Private Land Claims to the heirs, assigns and legal representatives of Francisco Montes Vigil and Juan Gonzales, and "That the plaintiff, together with the defendants other than the unknown heirs of Francisco Montes Vigil, deceased, are the owners and possess as tenants in common the tract of land known as the Alameda Land Grant." The complaint further alleges that the unknown heirs of Vigil claim some right, title or interest in the said lands, but denies the claim, alleging that Vigil sold and conveyed all his right, title and interest therein to Captain Juan Gonzales." Plaintiff further alleges: "That a portion of said tract of land in the Rio Grande Valley lying east of the foothills and below the irrigating ditches is occupied by various persons and claimed in severalty by reason of original allotments or by adverse possession, the amount of which said land so occupied and the names of the persons claiming to own said lands in severalty and the description of the land so occupied are to plaintiff unknown. "That all of the lands lying west of the irrigating ditches and foothills, and also a portion of the lands lying east of said irrigating ditches and

foothills in the Rio Grande Valley, are held and occupied by said plaintiff and the defendants other than the unknown heirs of Francisco Montes Vigil, as tenants in common." The judgment prayed for is that the defendants be required to set up or prove their respective interests in the premises or be forever barred; that partition be granted according to the rights of the several parties, and if material injury would result from partition, that the premises be sold and the proceeds divided as the rights of the respective parties may require.

The service made was by publication of notice by the clerk of the district court and first proof of publication was filed on the 6th day of August, 1906. As there is some question as to the sufficiency of this proof of publication, it will be set out in full, as follows:

"AFFIDAVIT OF PUBLICATION.

"Territory of New Mexico,

"County of Bernalillo – ss.

"W. T. McCreight, being duly sworn, declares and says that he is business manager of the Albuquerque Weekly Citizen, a newspaper published and having a general circulation in the city of Albuquerque and county of Bernalillo and territory of New Mexico; that the publication, a copy of which is hereto attached, was published in said paper, in the regular and entire issue of every number of the paper during the period and time of publication, and that the notice was

published in the newspaper proper and not in a supplement, for four times, consecutively, the first publication being on the 23rd day of June, 1906, and the last publication on the 14th day of July, 1906.

"(Signed) W. T. McCreight,

"Business Manager."

On the 21st day of September, 1907, another proof of publication was filed, as follows:

"PROOF OF PUBLICATION.

"Territory of New Mexico,

"County of Bernalillo – ss.

"William F. Brogan, being by me first duly sworn, deposes and says that he is the business manager and also the editor of the Albuquerque Weekly Citizen; that said Albuquerque Weekly Citizen was at the times hereinafter mentioned and now is published in the city of Albuquerque, county of Bernalillo aforesaid, and had and now has a general circulation in said city and county, and territory of New Mexico. That the notice of suit in the above cause, a copy of which is attached to a proof of publication filed in said cause on the 6th day of August, 1906, was printed and published in said Albuquerque Weekly Citizen once a week for four consecutive weeks; and that said notice was so printed and published in said Albuquerque Weekly Citizen on the 23rd day of June, 1906, and the 30th day of June, 1906, and the 7th day of July, 1906, and the 14th day of July, 1906; that said

publications of June 23rd, 1906, June 30, 1906, July 7th, 1906, and July 14th, 1906, were in the regular issues of said Albuquerque Weekly Citizen, and all the issues of said Albuquerque Weekly Citizen from the 23rd day of June, 1906, to the 14th day of July, 1906, both dates inclusive.

Wm. F. Brogan.

"Subscribed and sworn to before me, a notary public within and for said county of Bernalillo, by William F. Brogan, this 20th day of September, 1907.

"(Notarial Seal) Adela C. Holmquist,

"Notary Public."

On the 9th day of August, 1906, and prior in time to the filing of the second proof of publication, the following order was entered: "This day this cause came on to be heard upon the complaint, proof of publication and certificate of default and was submitted to the court for approval of publication. Whereupon the court, being fully advised in the premises finds that said publication of notice to said defendants was in all respects regular and in accordance with law, and that said defendants and each of them were duly served by publication of notice, and are in default for want of appearance within the time provided in said notice. It is therefore ordered, adjudged and decreed that the service of notice by publication and said publication of notice be, and the same hereby is, approved. It is further ordered, adjudged and decreed that the said complaint be, and the same

hereby is, taken as confessed by said defendants." And the order then provides for the appointment of Harry P. Owen, referee, to take proofs and report the same to the court, together with his findings of fact and conclusions of law.

March 16th, 1907, the following answer was filed: "Come now the defendants Bonafacio Montoya, Candelaria Montoya de Castillo, Adalberto C. de Baca, Francisco Montoya, Victoriana Montoya, Juan Antonio Rodarte, Rosa Maldonado, Abelino Maldonado, Manuel Gonzales, Nestora Gonzales de Sanchez, Leopoldo Sanchez, Felicita Sanchez, Sofia Sanchez, Raymunda Sanchez de Gonzales, Alfredo Gonzales, Erlinda Gonzales, Ariagapita Gonzales, Aurelia L. de Gonzales, Leopoldo Gonzales, Florencio Gonzales, Esoyla Gonzales, Prospero Gonzales, Epamimondo Gonzales, Aurora R. Gonzales, Maria Sanchez de Martinez, Melquia des Martinez, Felix Tafoya Gonzales, Pedro Sanchez, Merced Gonzales, Fabiana Gonzales, Dolores Griego de Cordova, and for answer to plaintiff's complaint, says that each of them claims an interest in the real estate described in said complaint and joins in the prayer of said complaint for partition of said real estate. (Signed) A. B. McMillen, Attorney for Defendants."

On the following day, March 17th, 1907, a judgment in partition was rendered, confirming the report of the referee, subject to the rights of certain persons as therein specified, and partitioning the premises among some 450 persons whose fractional interests are therein set out, if the same can be partitioned

without injury, etc. The decree does not extend to the entire Alameda Grant, but only extends to such portion thereof as is described as follows: "Territory of New Mexico, being a tract of land known as the Alameda Land Grant, bounded on the north by the ruins of an old pueblo; on the south by a small hill which was the boundary of Luis Garcia; on the east by the Rio del Norte as it ran in the year 1710 near the eastern foothills, and on the west a prairie and the hills, and containing, according to the official survey thereof, eighty-nine thousand three hundred and forty-six acres of land as will more fully appear from the record of said survey on file in the office of the Surveyor General of New Mexico. And the court further finds that the lands so partitioned are subject to the rights of claimants in severalty in that portion of the Alameda land grant in the Rio Grande Valley lying east of the foothills and below the irrigating ditches, in accordance with the exception in plaintiff's complaint; and that said claims in severalty are not determined in this proceeding."

The decree awards to Mr. A. B. McMillen a fractional interest of 26857-60480 in the lands partitioned, for legal services rendered and by purchase. On the 5th day of July, 1907, commissioners were appointed to make partition of the lands, but they reported that, "Owing to the nature of the land, most of which is fit only for grazing purposes, and owing to the large number of owners, there being more than five hundred, and to the fact that the interests in many instances are very small, that partition of said

premises cannot be made consistently with the interests of the estate or the rights of the persons found to own interests therein, and that a division thereof would be manifestly prejudicial to the owners thereof."

At this point in the progress of the case, and before any sale of the lands had been ordered or had taken place, on the 20th day of July, 1907, George S. Klock and A. A. Sedillo entered a special appearance, and, on behalf of a large number of persons, claimants of interests in severalty, filed a motion for leave to intervene in said cause and for leave to answer the plaintiff's complaint in the main case. In pursuance of this motion the court made the following order: "It appearing to the court that the persons who filed a special appearance in this action, by motion, on the 20th day of July, 1907, claim to be interested in the premises described in the complaint herein, and it further appearing that this suit and proceeding is still pending: It is hereby ordered that each and all of said persons so appearing by special motion in this action filed in this cause on July 20th, 1907, as aforesaid, be and they hereby are, allowed to appear and answer the complaint of the plaintiff in this action by way of intervention, and that said persons may assert any right, with the same force and effect as though said persons had been made parties in the first instance in this action, to which order plaintiffs excepted. It is further ordered that each and all of said persons so allowed to answer by way of intervention as aforesaid, be and they hereby are allowed

twenty days within which to file their said answer. Done in court this 20th day of November, 1907."

On the 29th day of November, 1907, counsel for some ninety or more interveners filed a voluminous answer denying all of the relief prayed for by the plaintiff and the defendants answering in the main case, and setting forth affirmatively the rights of the interveners. This intervention and answer so clearly states the case relied on by the interveners, that it will be set out in full here, beginning with paragraph 4. "4. Defendants admit that a portion of said tract of land in the Rio Grande Valley lying east of the foothills and below the irrigation ditches is occupied by various persons and claimed in severalty; but they deny that they claim the same in severalty by reason of original allotments or by adverse possession only, and allege that they also claim the same in severalty because they have owned and held the same by themselves and their predecessors in title for more than fifty years last past, holding and claiming the same under and by virtue of deeds of conveyance, devise, grant and other assurances purporting to convey an estate in fee simple, and that no claim by suit in law or equity effectually prosecuted has been set out or made to said lands and separate holdings within the aforesaid time of more than fifty years. And defendants deny that all or any of the land lying west of the irrigating ditches and foothills or a portion of the land lying east of said irrigation ditches and foothills in the Rio Grande Valley, or that any lands whatsoever of the tract of land known as the

Alameda Grant and involved in this action, are held and occupied by the plaintiff and the defendants other than the unknown heirs of Francisco Montes Vigil, or by any other person or persons whatsoever, as tenants in common. 5. Defendants deny each and every allegation contained in paragraph 7 of plaintiff's complaint. 6. And by way of defense, these defendants allege: That they are the owners in severalty and in possession respectively of diverse tracts of lands situate within the boundaries of the tract of land described in plaintiff's complaint, and that they and diverse other persons are the owners in severalty and in possession of diverse tracts of land situate within the boundaries of the tract described in said complaint, which said diverse tracts of land so owned and held in severalty constitute all of the tract of land known as the Alameda Grant and described in plaintiff's complaint; that they and their predecessors in title have had possession thereof respectively for more than fifty years last past, holding and claiming the same by virtue of deeds of conveyance, devise, grant and other assurances purporting to convey an estate in fee simple, and that no claim by suit, in law or equity, effectually prosecuted has been set out or made to said lands within the aforesaid time of more than fifty years. 7. That they are the owners in severalty and in possession, respectively, of divers tracts of lands situate within the boundaries of the tract of land described in plaintiff's complaint, and that they and their predecessors in title have had possession of each of said tracts of land respectively, for more than fifty years last past, holding and claiming the same

by virtue of deeds of conveyance, devise, grant and other assurances purporting to convey an estate in fee simple, and that no claim by suit, in law or equity, effectually prosecuted, has been set out or made to said lands within the aforesaid time of more than fifty years. 8. These defendants further allege that portions of the lands lying west of the irrigating ditches are not susceptible of irrigation, and are only valuable and can only be used for grazing purposes; that the tracts of land owned and held in severalty as herein alleged, embrace the lands lying west of the irrigating ditches, and also the lands lying east of said irrigating ditches, portions of which are also not susceptible of irrigation and are only valuable and can only be used for grazing purposes; that portions of said lands lying east and west of the irrigating ditches are susceptible of irrigation, that they are parts of the same lands and are embraced and described as such in the assurances of title aforesaid; that these defendants and their predecessors in title and the other divers persons and their predecessors in title have been in the open, actual, hostile, exclusive and continuous possession of each and all tracts of land owned and held by them in severalty as aforesaid, and that all of the tract of land known as the Alameda Land Grant, and described in plaintiff's complaint, has been so owned and held for more than fifty years last past; that during all said period of time these defendants and their predecessors in title, and the said diverse other persons and their predecessors in title respectively, have occupied, cultivated and improved those portions of said lands susceptible

of irrigation, cultivation and improvement, and have used the remainder thereof for grazing purposes, and claiming to own the whole of their individual possessions and holdings and the whole thereof, by virtue of deeds of conveyance, devise, grant and other assurances purporting to convey an estate in fee simple to each and all of said lands respectively. 9. Defendants further allege that each and all of the lands owned and held in severalty by them as aforesaid, respectively, are so owned and held by them in fee simple, and that the said plaintiff and any and all other persons whatsoever have no right, title or interest therein, either as tenants in common or in any other manner whatsoever. 10. Defendants further allege that the plaintiff, Vicenta Montoya, was the owner of a certain tract of land thirty-four varas wide from north to south and in length extending from about three hundred yards east of Corrales lower ditch to the west boundary line of the said Alameda Grant, bounded on the north by lands of Rafaela Gutierrez de Gonzales, on the south by lands of the heirs of M. S. Otero, deceased, on the east by lands of E. M. Sandoval, and on the west by the west boundary line of said Alameda Grant, which said tract of land she inherited from one Jose Antonio Montoya, her grandfather, and that she owned and held the same in severalty; that on the __ day of March, 1907, she conveyed the same to one Abenicio Perea in fee simple; and these defendants allege that the said tract of land was and is the only land that plaintiff owned in said grant, and that plaintiff has never had any other interest, either in common or otherwise, in any lands

in said grant, and these defendants allege that plaintiff is not an interested party in this action. Wherefore, these defendants pray that the prayer in plaintiff's complaint be denied; that the title of defendants to any and all lands owned by them in severalty or otherwise be declared and established and duly and forever quieted, and they be hence dismissed with their costs in this behalf expended."

Candido G. Gonzales, another intervener, filed a separate answer setting up his claims, which were in all respects similar to the above answer except that Gonzales claimed several tracts of land. Counsel for the plaintiff, and the defendants, represented by A. B. McMillen in the original cause, filed answers to the above petitions of the interveners, simply denying each and every allegation thereof, and Alonzo B. McMillen answered alleging ownership by him of the lands awarded him by the judgment in partition, and joins in the prayer for partition. By a stipulation in writing signed by the attorneys for all the parties, numerous other claimants in severalty were authorized to appear as original interveners. The cause being submitted to the court for decision on the pleadings, oral and documentary, proofs and arguments of counsel for the respective parties, the court rendered a decision in favor of the interveners and against the plaintiff, as well as the defendants. On the 4th day of January, 1910, the court entered final judgment in favor of the interveners, awarding to each of them certain tract or tracts of the land, describing each tract by the number of varas in width

and running the entire length of the premises from east to west, declaring the owner of each tract and including in the judgment voluminous findings of fact. The judgment concludes as follows: "It is therefore ordered, adjudged and decreed that the said interveners above mentioned are entitled to hold the tracts of land set off to them in the foregoing decree in severalty, free from all claim or claims of the plaintiff in this action and her co-tenants or their successors or assigns. And the said plaintiff, her co-tenants and their successors or assigns are enjoined and forever barred from claiming any right, title or interest in or to any of the said lands above described, whether under the decree of partition heretofore entered in this cause or otherwise. It is further ordered, adjudged and decreed that the said interveners recover from the said plaintiff their costs herein, to be taxed."

McMillen and other defendants who united with the plaintiff in the original cause, and confirmed the report filed by the commissioners to the effect that the lands could not be partitioned. A formal judgment was entered, a portion of which is as follows: "And the court having announced its decision in the intervention proceeding of Candido G. Gonzales and other interveners represented by George S. Klock and A. A. Sedillo and of the intervener Jacobo Yrisarri, favorable to the respective interveners, but the decree fixing the rights of said interveners not having been entered of record, and it appearing advisable that the respective decrees in favor of interveners should be

separately entered, it is ordered that the order of sale herein, and the sale to be made in pursuance thereof, shall be subject to the rights of said interveners respectively, as established by such order, judgment and decree as shall be finally made in favor of said interveners respectively either in this court or in any proper appellate court on appeal; and it is further ordered that said sale be made subject to the exceptions and reservations heretofore made in the decree of partition, and subject to the rights of George Hill Howard in and to the lands set forth in his intervening petition heretofore filed in this cause, in accordance with the written stipulation on file in this cause. And this cause coming on to be further heard upon the report of said commissioners, the court being fully advised in the premises, doth order, adjudge and decree that the premises hereinafter described be sold at public auction, at the front door of the county courthouse of Bernalillo county, to the highest and best bidder for cash; subject, however, to the exceptions, conditions and reservations hereinbefore mentioned; which said premises are situate in the counties of Bernalillo and Sandoval, territory of New Mexico, and described as follows, to wit: A tract of land known as the Alameda Land Grant, bounded on the north by the ruins of an old pueblo; on the south by a small hill, which was the boundary of Luis Garcia; on the east the Rio Del Norte as it ran in the year 1710, near the eastern foothills, and on the west a prairie and the hills, and containing, according to the official survey thereof, 89,346 acres of land, as will more fully appear from the record of said survey

on file in the office of the Surveyor General of New Mexico, reference to which is made for more particular description." Exceptions were properly saved to the findings and judgment of the court below, and the cause was brought to this court by an appeal prayed for and granted to the plaintiff and defendants, to whom interests were awarded by the judgment in the original partition proceeding.

OPINION OF THE COURT.

It appears from the elaborate statement of the proceedings, that the plaintiff in the court below filed a complaint seeking the partition of a portion of the Alameda land grant, situated in both Bernalillo and Sandoval counties. There were no individual defendants when the cause was instituted, but the defendants were denominated, "Unknown heirs and unknown owners" claiming interests in that grant. The only service had was by publication. After publication for service had been made numerous individuals represented by plaintiff's counsel Mr. A. B. McMillen, and Mr. McMillen a claimant of a large amount of the lands by purchase or otherwise, appeared as defendants, but confessing the allegations of the complaint and alleging heirship, they joined the plaintiff in the prayer for partition. Judgment by default was taken, and Harry P. Owen was appointed referee to take the proofs and genealogy, and report to the court. Testimony was taken before Mr. Owen, conducted by Mr. McMillen, attorney for the plaintiff and the defendants for whom he appeared, and the

referee reported a genealogy and a statement of the respective undivided interests of some four hundred and fifty or more persons found by him to be heirs and owners of interests in the Alameda Grant. This report was confirmed, and a judgment rendered by the court declaring those persons entitled to undivided interests as stated in the referee's report. In the last clause of the judgment three commissioners were appointed to make partition of the lands among the respective parties, and, if partition cannot be made without manifest prejudice to the interest of the parties, that the commissioners shall so report. The judgment was filed June 17th, 1907, but, while the commissioners made a report on the 5th day of July, 1907, that the premises could not be partitioned without manifest prejudice, the report was not confirmed, and a sale ordered until March 11th, 1909, nearly two years after the preliminary judgment in partition was rendered. As will be seen by the statement of the case, the application for leave to intervene was made July 20th, 1907, and the order allowing intervention was granted November 20th, 1907. Between the time of the entry of the judgment in partition July 5th, 1907, and the order confirming the commissioners' report and for sale of the premises, March 11th, 1909, the issues being joined between the parties and the rights of the respective parties, both as to the partition and intervention – the same being practically consolidated – were fully litigated and a final decree was rendered in favor of the interveners declaring them to be the owners of the lands claimed by them, and defining the amount

to which each of the interveners are entitled, the terms of the final decree being set forth in the statement of the case.

The first assignment of error is upon the order of the court allowing intervention. In the decision of this cause it should be understood that it is conceded by all of the parties to the litigation that the Alameda Grant is a perfect grant, and was so declared by the Court of Private Land Claims in 1892. This litigation, therefore, does not involve a contest between the sovereign and individual heirs or claimants, but is a contest between individual claimants who assert ownership of interests in the land of the grant, as heirs, assigns, purchasers, long continued possession and use by those claiming under deeds, conveyances, devise, grant or other assurances purporting to convey an estate in fee simple, in which the sovereign has no interest. Counsel for appellants, both in oral argument and by brief deny the right of intervention, insisting that a final decree had been rendered in their favor in the partition suit awarding them the land; that the decree was binding as against all adverse claimants, and effectually barred any right of intervention to assert rights of ownership in the lands in litigation. Under the partition statute of this territory intervention is specifically provided for in Section 3182 Compiled Laws 1897, as follows: "During the pendency of any such suit or proceeding any person claiming to be interested in the premises may appear and answer the petition and assert his right by way of interpleader, and the court shall decide

upon their rights as though they had been made parties in the first instance." It will be observed that persons claiming to be interested in the premises may intervene during the pendency of a suit or proceeding having for its object the partition of lands. No limitation as to the time of intervention is prescribed, except that it must be during the pendency of the suit. In the order of the court allowing the claimants to intervene, it is stated that the suit was still pending at the time the order was made, and, being so, it was the duty of the court to grant the application; there was no discretion to grant or refuse the right, as it was a statutory right during the pendency of the proceeding. Baca v. Anaya, 14 N.M. 382, 94 P. 1017.

It thus appearing that the intervention was in apt time, the next inquiry is whether or not the first decree in the partition proceeding was final, and deprived the interveners of any claim or interest in the lands involved, for the settlement of which a right of intervention existed. The interveners in this case claim the ownership of the lands sought to be partitioned in the original suit. If they are the owners of the land the partition proceedings, if unopposed, would effectually deprive them of that ownership. In fact, that, in substance, is the contention of appellants' counsel; that the preliminary decree already rendered has the effect of quieting the title to the lands claimed by both parties in appellants. Such is the logical result of the contention, that no right of intervention exists because of the rendition of the preliminary decree. That title to real estate claimed

by different parties may be determined in a partition suit, and that intervention is a proper proceeding by which to accomplish this result, was settled by this court in Baca v. Anaya, supra, in which case the court, after reviewing numerous decisions of other courts, said: "We concur with all that is said by these courts, and hold that under our statute the owner of the whole or any part of the premises sought to be partitioned may, whatever the origin of his title, intervene for the settlement of his rights." In this jurisdiction, and under our statute, it cannot be successfully maintained that the default decree or judgment, as it is called, is a final decree having any such effect as is contended for. Partition proceedings in a large number of states in which statutes are similar to our own, are peculiar in that two decrees are necessary to a final vesting of title to the lands in individual ownership. In such jurisdictions the first decree declaring the interests of the parties in the lands sought to be partitioned and appointing commissioners, is designated preliminary or interlocutory. Many of our statutes are practically the same as those of the state of Missouri, and seem to have been taken therefrom for the purpose of making our procedure similar to the settled and adjudicated procedure of that state. The decisions of that state, therefore, are of value to us in partition suits, as the procedure is similar to our own. In Aull v. Day, 133 Mo. 337, 34 S.W. 578, after citing numerous cases to the same effect, the court said: "A judgment in a partition suit which declares the rights of the parties and orders partition is interlocutory only and is under the

control of the court until the final decision of the suit, and may be modified or rescinded at any time before final judgment, even after the expiration of the term at which it was rendered." And the court further said in that case that even in a case where the answer admitted the allegations of the petition, the judgment would still be interlocutory only. In the state of New York the procedure under the Code is of the same nature. In Mingay v. Lackey, 142 N.Y. 449, 37 N.E. 471, the court said: "The judgment of April 8, 1893, was interlocutory, and not final. It declared the then existing rights and interests of the parties to the litigation in the land. But it divested no title. It directed a reference for sale, for inquiry, for computation and for accounting. It provided for a distribution of the proceeds of the sale based upon the several interests in the land which should be included in the sale. But the sale would become binding only upon confirmation by the court, and until confirmation the purchaser would not be required to pay the purchase money, and until the purchase money was paid or secured there would be no fund for distribution. The practice in partition proceedings of entering in the first instance an interlocutory judgment, to be followed by a final judgment upon the termination of the proceedings authorized by the interlocutory judgment, prevailed in chancery, and is expressly authorized and required by the Code." It seems wholly unnecessary to multiply citations in support of this view, but a reference to Section 3138, Compiled Laws of 1897, authorizes a similar preliminary judgment. The next section, however, clearly indicates the

necessity and grants authority for a final judgment, and the record shows the rendition of a final judgment by the court. We have examined the authorities referred to in appellants' brief as to this point, but find that they do not sustain the contention of counsel, with one or two exceptions, but the diverging cases are from states where by statute or Code a different procedure is provided for. Take, for instance, the case of Petrucio v. Seardon, 76 Tex. 639, 13 S.W. 560. This case is in line with counsel's contention, but the state of Texas has a different procedure. "In two states the power of the court to make partition directly and without the aid of commissioners has been affirmed, and in another that the court may direct the mode of partition. These decisions stand alone. The general rule is to the contrary." Cyc. vol. 30, p. 250. The three states above referred to are Texas, Tennessee, and Louisiana. The judgment relied upon by appellants was interlocutory, and, as the record shows that no final judgment or decree was ever rendered in favor of the appellants, but, on the contrary, the final decree was in favor of the appellees, the interveners, hence no error was committed by the court in allowing the intervention, notwithstanding the interlocutory decree.

The remaining seven assignments of error all go to the merits of the case, each of them challenging the correctness of the final decree rendered by the court in favor of the intervening appellees and against the appellants. That a clear understanding of the scope of the present controversy as presented in the lower

court and also by the record on this appeal may be had, it must be kept in mind that the Alameda Grant includes some 89,346 acres of land; that a considerable portion of these lands are situated in the Rio Grande Valley above the city of Albuquerque, and a large part of the valley lands are, and for a great many years have been, occupied, improved and cultivated. These occupied lands lie between the Rio Grande and the foothills on the west side of the valley. These lands are divided in strips, some of which are inclosed and some are not. As to these strips of occupied and cultivated land, the original petition contains the following allegation: "Plaintiff further alleges that a portion of said tract of land in the Rio Grande Valley lying east of the foothills and below the irrigating ditches is occupied by various persons, and claimed in severalty by reason of original allotments or by adverse possession, the amount of which said land so occupied and the names of the persons claiming to own said lands in severalty and the description of the land so occupied are to plaintiff unknown. Plaintiff further asks that partition hereinafter prayed for be made subject to the rights of said occupants in severalty." The interveners in their interpleader and answer as to these same strips of land allege: "That they are the owners in severalty and in possession, respectively, of diverse tracts of lands situate within the boundaries of the tract of land described in plaintiff's complaint, and that they and their predecessors in title have had possession of each of said tracts of land respectively, for more than fifty years last past, holding and claiming the same

by virtue of deeds of conveyance, devise, grant and other assurances purporting to convey an estate in fee simple, and that no claim by suit, in law or equity, effectually prosecuted, has been set out or made to said lands within the aforesaid time or more than fifty years." The lands sought to be partitioned by all of the parties is a large body of uncultivated and unimproved grazing land, extending from the ditches on the west side of the cultivated lands to the western boundary of the grant. As to this land the petition for partition alleges: "That all of the lands lying west of the irrigating ditches and foothills, and also a portion of the lands lying east of said irrigating ditches and foothills in the Rio Grande Valley, are held and occupied by said plaintiff and the defendants other than the unknown heirs of Francisco Montes Vigil, as tenants in common." While the interveners make the following allegations: "These defendants further allege that portions of the lands lying west of the irrigating ditches are not susceptible of irrigation, and are only valuable and can only be used for grazing purposes; that the tracts of land owned and held in severalty as herein alleged, embrace the lands lying west of the irrigating ditches, and also the lands lying east of said irrigating ditches, portions of which are also not susceptible of irrigation, and are only valuable and can only be used for grazing purposes; that portions of said lands lying east and west of the irrigating ditches are susceptible of irrigation, that they are parts of the same lands and are embraced and described as such in the assurances of title aforesaid; that these defendants and their

predecessors in title and the other diverse persons and their predecessors in title have been in the open, actual, hostile, exclusive, and continuous possession of each and all tracts of land owned and held by them in severalty as aforesaid, and that all of the tract of land known as the Alameda Land Grant, and described in plaintiff's complaint, has been so owned and held for more than fifty years last past; that during all said period of time these defendants and their predecessors in title, and the said diverse other persons and their predecessors in title respectively, have occupied, cultivated and improved those portions of said lands susceptible of irrigation, cultivation and improvement, and have used the remainder thereof for grazing purposes, and claiming to own the whole of their individual possessions and holdings and the whole thereof, by virtue of deeds of conveyance, devise, grant and other assurances purporting to convey an estate in fee simple to each and all of said lands respectively."

From these allegations it is apparent that both parties claim the ownership of those mesa or grazing lands, the appellants as the heirs of Captain Juan Gonzales, and the appellees by fee simple title under "conveyances, devise, grant and other assurances purporting to convey an estate in fee simple," as provided for in Section 2937, Compiled Laws 1897. At the conclusion of the trial of the cause the same was submitted upon the pleadings, proofs, and arguments of counsel for the respective parties, the court rendered a final decree with voluminous findings of fact,

a separate decree in favor of each of the interveners, and a general decree in favor of all the interveners and against the parties to the original cause and appearing by way of intervention, in terms as follows: "It is therefore ordered, adjudged and decreed that the said interveners above mentioned are entitled to hold the tracts of land set off to them in the foregoing decree in severalty, free from all claim or claims of the plaintiff in this action, and her co-tenants or their successors or assigns. And the said plaintiff, her co-tenants and their successors or assigns are enjoined and forever barred from claiming any right, title or interest in or to any of the said lands above described, whether under the decree of partition heretofore entered in this cause or otherwise." Exceptions were properly saved by appellants' counsel to this decree. There being 86 findings of fact, a few of which are general, substantially applying to all, while the remaining findings apply to each of the claims of the interveners, it is impractical to set them out in full in this opinion, but it will suffice to set out in full one or two of the general findings, and one of the findings as to the separate tracts, as all of those are substantially the same. "Finding No. 1. The interveners claim strips of land within the Alameda Grant very narrow in proportion to their length, most of them being only a few yards in width, each, and extending from the Rio Grande west to the ceja, or ridge, dividing the watershed of the Rio Grande from that of the Rio Puerco and forming the western boundary of the grant, a distance of about sixteen miles. Most of them include land between the Rio Grande and the foothills

at the west of the valley, which is adapted to cultivation, and the land extending from the foothills to the ceja of the Rio Puerco, which is adapted to grazing only. Most of the interveners live on the easterly ends of the strips of land they claim, and cultivate such portions of the bottom lands between the river and foothills in the respective strips as they require. Near the river the land is what is termed bosque; that is, land covered with a growth of brush, trees and wild grass, and is used for pasturage. In the valley the strips of land are to some extent separated by fences and to some extent the bosque is separated in that way from the cultivated lands. From the foothills west there are no fences, nor are there any fences at the western boundaries of the strips or of the grant. By stipulation between the parties the titles to the lands between the river and the foothills are not to be determined in this action, but that does not exclude the evidentiary bearing, if any, which the use, occupation and claims of possession and ownership of these lands by interveners respectively, so far as they appear in evidence, may have on their use, occupation and claims of possession respectively of the lands extending westerly from the foothills. The last-named land bears a scanty growth of grass and other herbage, and is without water, it being customary and necessary to have the animals pastured there go to the Rio Grande for water at intervals of three or four days, except for short and infrequent periods when their needs are supplied by rain or snow. By agreement, or common understanding, which has ripened into a general custom, the interveners and their

predecessors in claim of ownership have used those westerly portions of the strips they claimed, in common with each other and with others claiming ownership in the grant, no one attempting to keep his animals exclusively on the land he claimed nor requiring others claiming ownership to keep their animals off such land. To some extent those who were not claiming ownership of any land within the grant pastured their animals on the portion of it in question west of the foothills, and on the strips claimed by the interveners with the other animals pastured there, without objection by those who claimed the strips, but without their consent, except as they failed to take active measures to prevent such intrusion. This method of use was the one most convenient, economical and advantageous to the interveners and as to all the strips, except the northern one of Gonzales, the only practicable one because of the size and shape of the respective strips which would make the expense of fencing them greatly disproportionate to their value, the character and location of the land, the scantiness of herbage and the lack of water upon it, and for no other reasons appearing in the evidence." Separate Finding No. 7. "Jose Chaves, one of the interveners, claims a strip of land situated within the Alameda Land Grant, extending from the Rio Grande on the east to the ceja of the Rio Puerco on the west, and containing 80 varas in width from north to south, and bounded on the north by land claimed by Concepcion Trujillo de Sandoval, and on the south by land claimed by Noyola Chaves; which said strip corresponds to strip No. 10 of the list of strips hereinafter

referred to, and is claimed by intervener and his predecessors in title by virtue of certain unrecorded deeds of conveyance purporting to convey an estate in fee simple thereto, for more than ten years next preceding the beginning of this action, and consists of bottom land between the Rio Grande and the foothills and the mesa, or upland, extending west from the bottom land to the ceja of the Rio Puerco. Of the latter land he and his predecessors in title have had such possession as that described in Finding 1 of Fact herein for more than ten years next preceding the beginning of this action. On the easterly portion of said strip, that between the Rio Grande and the foothills, said intervener and his predecessors in title have lived in houses which they built, and they have built on, fenced and cultivated such portions of said valley land as they required for their purposes, crops and stock, for more than ten years next preceding the beginning of this action; and in connection with it, they used the portion of said strip extending from it to the ceja of the Rio Puerco, as set forth in said Finding 1 of Fact herein." Finding No. 82. "That Captain Juan Gonzales lived upon said Alameda Land Grant, and that there has always been a large number of the heirs of said Captain Juan Gonzales living within the boundaries of said Alameda Land Grant. A portion of the heirs of said Captain Juan Gonzales who lived within said boundaries were: Mariano Gonzales, who is now living upon said grant and has lived there all his life; his father Jose Gonzales; his grandfather Santiago Gonzales; and his great grandfather Juan Gonzales, who lived on said grant

all their lives; also Juan Antonio Rodarte, who has lived on said grant all his life; also Merced Gonzales and her father, Miguel Gonzales, who have lived on said grant all their lives; also Fabiana Gonzales and her father, Jesus Gonzales, who have lived on said grant all their lives; also Candido G. Gonzales and his brother, Conrado A. Gonzales, and his father, Ignacio Gonzales, and his mother Abelina Garcia de Gonzales; also his grandfather, Santiago Gonzales, and his great grandfather, Juan Gonzales, all of whom lived on said land grant all their lives; also Florencio Gonzales, before he went to Lincoln county; also Jose Gonzales and Manuel Gonzales and Sixta Gonzales, brothers and sister of Ignacio Gonzales, who lived on said grant all their lives." Finding No. 83. "It appeared, however, and is so found, that from a time farther back than the memory of any witness extended, the greater part of the land within the limits of the grant has been claimed and occupied in strips, as set forth in Finding of Fact 1, the land from the foothills to the ceja of the Rio Puerco in common for pasturage, and the bottom lands generally by those claiming the ownership of them separately, as set forth in said finding. It did not appear that the heirs of Captain Juan Gonzales or any of them living within the boundaries of the grant had ever claimed or asserted any right to or interest in any portion of said land grant except such strips as they claimed respectively until and except as appears from warranty deed from Juan Antonio Rodarte to A. B. McMillen for an undivided one-twenty-fourth part of said grant, dated January 8th, 1907, and by warranty

deed from Merced Gonzales de Romero and Fabiana Gonzales for the undivided one-fifty-sixth part of said grant, dated February 27th, 1907; and it did not appear that they or any of them occupied or used any portion of said grant except as others within the grant occupied and used the strips they claimed, the bottom lands in severalty and the grazing lands in common, as set forth in said Finding of Fact 1." Finding No. 74 gives a list of 162 separate strips of land, together with the name of the owner, the number of varas wide from north to south and a number is given each tract. The terms of the separate decrees in favor of the interveners is: "It is further considered, adjudged and decreed that the intervener, Jose Chaves is the owner in fee simple absolute and in severalty of the following described strip, tract and parcel of land situate within the limits of the Alameda Land Grant, bounded and described as follows: Containing 20 varas in width from north to south and in length extending from the Rio Grande on the east to the ceja of the Rio Puerco on the west, and bounded on the north by land claimed by Felix Tafoya y Gonzales, and on the south by land claimed by Jose Gonzales y Montoya; and which said strip corresponds to strip No. 20 of the list of strips referred to in the findings of fact in said cause and in the list of strips annexed hereto and made a part of this decree." The court, in Nos. 76, 77 and 78, found that the grant was made to Francisco Montes Vigil; that he conveyed the land to Captain Juan Gonzales, on the 18th day of July, 1712, as alleged, and that the grant was confirmed as a perfect grant. The record contains

translations of Exhibits 28, 28A and 28B, purporting to be deeds and a will under which Candido G. Gonzales claims ownership of one certain tract, also Exhibits 65, 65A, and 65B, purporting to be conveyances under which Francisco Lucero y Montoya claims ownership. No other testimony, either oral or documentary, is found in the record. The conveyances referred to in the findings of fact, under which interveners claim ownership, are not found as exhibits in the record, nor is there any evidence tending to dispute the findings that the interveners and their predecessors in title claimed the lands by virtue of "certain deeds of conveyance purporting to convey an estate in fee simple." Where the record does not bring up the evidence for examination by the court, the findings of the court upon questions of fact will not be disturbed in this court. Cunningham v. Springer, 13 N.M. 259, 82 P. 232.

There being no specific assignment of error raising this question, and in view of the statement in the brief of counsel for appellants that "no one of the interveners, by any instrument of writing introduced in evidence showed title in himself coming from Captain Juan Gonzales," * * * and the further statement that "while in some cases the length of the possession was questionable, the appellants did not question the right of the interveners to the land actually cultivated or inclosed by them, it must be assumed that the conveyances under which the respective interveners claimed title were before the court and, together with such other evidence as may

have been introduced, supported the findings of the lower court," we are of opinion that the findings of the trial court are within the principle announced by this court in the cases: Hamilton Mining Co. v. Hamilton, 14 N.M. 271, 91 P. 718; Hagerman Irrigation Company v. McMurray.

This brings us to the consideration of the main question in this case, and, in view of the large amount of litigation which has arisen and will no doubt continue to arise in this territory, the decision of the case will be of great importance. Counsel on both sides seem to desire that the case shall be decided upon its merits and not upon technical grounds, that the rightful owners of the land in controversy may have their titles passed upon and set at rest. In the partition proceeding, and prior to the setting up of the claims of the interveners, the court had rendered a preliminary decree declaring the rights of the partition claimants (the heirs of Captain Juan Gonzales), to be as follows: "The parties hereinafter mentioned and to whom the respective undivided interests in said lands are decreed are the owners of said tract of land in fee simple, as tenants in common, in proportions as indicated by the fractions set opposite their respective names, and that no person or persons other than said parties hereinafter mentioned have any interest in or title to said land or any part thereof, in possession, remainder, reversion, or otherwise, except as hereinbefore excepted" but at the close of the case, after rights of the interveners had been fully litigated, the court rendered the following

final decree: "It is therefore, ordered, adjudged and decreed that the said interveners above mentioned are entitled to hold the tracts of land set off to them in the foregoing decree in severalty, free from all claim or claims of the plaintiff in this action and her co-tenants or their successors or assigns. And the plaintiff, her co-tenants and their successors or assign are enjoined and forever barred from claiming any right, title or interest in or to any of the land above described, whether under the decree of partition heretofore entered in this cause or otherwise." Obviously these decrees are in direct conflict, inasmuch as they relate to the same land, at least to a considerable extent, and the court, recognizing this, set aside the former decree.

The vital question presented by this appeal, then, is, did the court err in rendering the latter decree? The answer, as disclosed by the learned discussion in the briefs of counsel, and in oral arguments as well, must be found, so far as the interveners' rights are concerned at least, in the intent and purpose of the legislature of the territory in the enactment of Chapter 17 of the Laws of 1858. Section one of this chapter, now section 2937, Compiled Laws 1897, is set out in full later on. For forty-one years this section remained in its original form, and but one unimportant amendment has been made to it. In 1899 the legislature made the following amendment by way of substitution, beginning with the first proviso: "Provided, that if any person entitled to commence or prosecute such suit or action is or shall be, at the time the

cause of action therefor first accrued, imprisoned, of unsound mind, or under the age of twenty-one years, then the time for commencing such action shall in favor of such persons be extended so that they shall have one year after the termination of such disability to commence such action; but no cumulative disability shall prevent the bar of the above limitation, and this proviso shall only apply to those disabilities which existed when the cause of action first accrued and to no other." The only changes made by this amendment was to modernize the language of the substituted portion; limit the disabilities for which time to sue is given, to those imprisoned, of unsound mind or under the age of 21 years, and to reduce the time in which suit must be brought after removal of disability from three years to one. It may be said, therefore, that this section is still substantially as it was originally enacted in 1858. It becomes a pertinent inquiry, at this point, as to what were the conditions existing at the time necessitating or making desirable the enactment of such a statute, and in order that we may have a better understanding of the intent and purpose of the legislature in drafting its provisions we will put the inquiry in an interrogative form; what beneficial purpose was such a statute designed to subserve? We have been impressed with the observations of counsel for the appellees as to the conditions then existing and which demanded a solution such as this law affords, taking the view that this section was not intended to be a statute of limitation and repose merely, but was also intended to grant affirmative relief by way of conferring title

upon the pioneer agricultural settlers as a reward of honest toil and diligence, indicating good faith in the settlement and improvement of what was at that time a comparatively barren and sparsely settled section, as indeed the whole territory was at that time, for that matter. Going back of the time of the enactment of this statute, an historical reference would seem to be appropriate. The Republic of Mexico, following the achievement of its independence from the parent country, had continued the policy of granting lands to individuals. These grants were dormant and useless until population made settlement thereon. In the possession of the titled grantee (and we refer to a military title) they were a source of weakness rather than of strength to the province. Prior to the enactment an increasing number of people from year to year were seeking settlement upon these grants and were making use thereof by a civilized cultivation. Transfers of land embraced within land grants had been made with considerable frequency. This is evident from the very large number of exhibits in the case at bar. Some of the grantees of the grant, when the contest between the Republic of Mexico and the United States in the War of 1846-47 came on and was ended by the Treaty of Guadalupe Hidalgo, doubtless abjured the province of New Mexico and remained citizens of the Republic of Mexico. The people of this territory were thoroughly familiar with the existing conditions and with the prior traditions and practice. It was within the decade following the acquisition of New Mexico by the United States. American and European settlers were

coming this way. The native population was also increasing, and it was obvious to the people and the law-making power, that efforts would be made, as such efforts are now being made, to disturb grantees, occupiers, heirs, and devisees in their respective possessions held by written evidence of title. Possession that these claimants had lawfully acquired and for which they had paid a consideration. These settlers and occupiers had defended the soil and the people occupying it from the incursions of the Indians. This had been done at a very great sacrifice. The law making power, confronted with these conditions and appreciating the necessity for legal protection not only from fictitious claimants but from claimants who had long slept upon their rights as well, enacted this statute and thus assured protection to persons possessing land described in their deeds, assurances and devises, in their bona fide claims of ownership. The legislature, therefore, enacted the statute in question, and intended to create, and did create, a right and title as to real property acquired in a land grant and provided another and different rule of limitation as to real property which might be adversely acquired under Section 2938. It should be understood that, in so far as this case is concerned, the construction placed upon Section 2937, supra, is made applicable to Spanish or Mexican land grants only. As the grant lands herein described are within such a grant, the grants of lands by the United States, which might be of a very different nature, are not deemed pertinent to the decision of this case.

Before adverting to Section 2938, the section which appellants insist is controlling as to appellee's claims, we will examine Section 2937 somewhat more in detail. It is not, and cannot be successfully denied, that the section provides an absolute limitation of the right to bring suit either in law or equity after the lapse of ten years, as against those in possession within the terms of the act, except where disability to sue exists, when suit may be brought within one year after the disability has ceased to exist. We need not further consider that provision of the section. But there is much more in this section, for the act is made specifically applicable to lands "granted by the governments of Spain, Mexico and the United States, or by whatever authority empowered by said governments to make grants to land." The Alameda Grant, being an individual grant in private ownership, there can be no doubt of the application of this section to the lands embraced in the Alameda Grant, which had been in existence for one hundred and forty-eight years at the time this statute was enacted. Even at the time this law was passed these grants were largely owned by heirs and assigns of original grantees, and these heirs would, naturally, be widely separated from each other and few, if any, of them in actual occupation of the lands. The lands, being unoccupied and uncultivated, induced settlers to enter upon them, and for many years before and after the American occupation these settlers have been occupying, cultivating, and grazing these lands and purchasing, selling, and devising and assigning them by deeds, wills, and other documents, and in good

faith, claiming the ownership of the lands, notwithstanding these title documents may not be traceable to the real heirs or owners of the grant. Now this act provides that all of those persons, their children, heirs or assigns who were in possession of portions of these lands for ten years, claiming them under the provisions of the act at the time of its enactment or at any time thereafter "**shall have a good and indefeasible title in fee simple to such lands, tenements, and hereditaments.**" This fee simple title is conferred upon all those who have complied with the conditions prescribed by the act. The conditions imposed are set forth in the act in clear and unambiguous language as follows: "In all cases where any person or persons, their children, heirs or assigns, shall at the passing of this act or at any time thereafter, having had possession for ten years of any lands, tenements or hereditaments which have been granted by the governments of Spain, Mexico or the United States or by whatsoever authority empowered by said governments to make grants to lands, holding, or claiming the same by virtue of a deed or deeds of conveyance, devise, grant, or other assurance purporting to convey an estate in fee simple, and no claim by suit in law or equity effectually prosecuted shall have been set up or made to the said lands, tenements or hereditaments, within the aforesaid time of ten years, then and in that case, the person or persons, their children, heirs or assigns, so holding possession as aforesaid, shall be entitled to keep and hold in possession such quantity of lands as shall be specified and described in his, her or their deed of

conveyance, devise, grant or other assurance as aforesaid, in preference to all, and against all, and all manner of person or persons whatsoever; and any person or persons, their children or their heirs or assigns, who shall neglect or who have neglected for the said term of ten years to avail themselves of the benefit of any title, legal or equitable, which he, she or they may have to any lands, tenements or hereditaments, within this territory, by suit of law or equity effectually prosecuted against the person or persons so as aforesaid in possession, shall be forever barred, and the person or persons, their children, heirs or assigns so holding or keeping possession as aforesaid by the term of ten years, shall have a good and indefeasible title in fee simple to such lands, tenements or hereditaments." Comparing the requirements of this section with the evidence as disclosed in the findings of fact, some of which are set out in full in a former part of this opinion, it cannot be doubted that the interveners, with possibly two exceptions, to be referred to later, have met all of the requirements of the statute, and even more than the statutory requirements. These settlers have been in possession for the time required, cultivating and improving the valley lands, although the statute is silent as to that, nor does it define the character of possession as prescribed by Section 2938 as amended in relation to title by adverse possession. Appellees were holding and claiming certain described strips of land a certain number of varas wide from north to south and extending from the eastern to the western boundaries of the grant, claiming the lands under

deeds of conveyance purporting to convey to them a fee simple title, and no suit has been either instituted or prosecuted by the appellants or any other person as provided for in the act. Indeed, it is not insisted that any such suit was instituted by the appellants, except the present action. The contention of appellants that the interveners did not show written title from the heirs of Captain Juan Gonzales falls to the ground under this section, for the reason that only color of title is required. Color of title has been repeatedly defined by both text writers and the courts: "The courts have concurred, it is believed, without on exception in defining 'color of title to be that which in appearance is title, but which in reality is no title.' They have equally concurred in attaching no exclusive or peculiar character or importance to the ground of the invalidity of an apparent or colorable title; the inquiry with them has been, whether there was an apparent or colorable title, under which an entry or claim has been made in good faith. The authorities seem to be conclusive to the point that a claim to property, under conveyance, however inadequate to carry the true title to such property, and however incompetent might have been the power of the grantor in such conveyance to pass a title to the subject thereof, yet a claim asserted under the provision of such a deed is strictly a claim under color of title, and one which will draw to the possession of the grantee the protection of the statute of limitations, other requisites of those statutes being complied with. This subject was somewhat recently before the Supreme Court of the United States and the former decisions

of that court upon the question were elaborately examined, and the conclusion was declared in accordance with these views, and it was decided that what is color of title is matter of law, and when the facts exhibiting the title are shown, the court will decide whether they amount to color of title. But good faith in the party, in claiming under such color, is a question of fact for the jury." Tyler on Ejectment and Adverse Enjoyment, pp. 872, 873. In Wright v. Mattison, 59 U.S. 50, 18 HOW 50, 15 L. Ed. 280, the court says: "We deem it unnecessary to examine in detail the numerous decisions adduced in the argument for the plaintiff in error, to define and establish the meaning of the phrase 'color of title.' The courts have concurred, it is believed without an exception, in defining 'color of title' to be that which in appearance is title, but which in reality is no title. They have equally concurred in attaching no exclusive or peculiar character or importance to the ground of the invalidity of an apparent or a colorable title; the injury with them has been whether there was an apparent or colorable title, under which an entry or a claim has been made in good faith." The above case is a leading one and is supported by a long line of cases, both in the United States and state courts. Schrimpscher v. Stockton, 183 U.S. 290, 46 L. Ed. 203, 22 S. Ct. 107; Cameron v. United States, 148 U.S. 301, 37 L. Ed. 459, 13 S. Ct. 595. In the case of Lea v. Polk County Copper Co., 62 U.S. 493, 21 HOW 493, 16 L. Ed. 203, the court says: "Where a person was in possession, this was sufficient notice to a claimant of an adverse title; and whether the deed under which

this person claimed was registered or not was of no importance to the claimant. The act of limitations of the State of Tennessee protects persons in possession of land under the following circumstances: 'First, they must have had seven years possession of land granted by the state; second, they must have held or claimed the land by virtue of a deed of conveyance, or other assurance, purporting to convey an estate in fee simple; third, no claim by suit in law or equity, effectually prosecuted should have been set up or made to said lands within that time.' Under the second head, an unregistered deed is sufficient to constitute the bar. The deed, when recorded, related back to its date." We refer to this case, not only to support the doctrine of color of title, but because of the declaration therein that it is immaterial whether the claimant's deed is recorded or not. In the findings of fact in this case it is shown in some cases that the deed of conveyance under which certain interveners claimed title had not been recorded. Packard v. Moss, 68 Cal. 123, 8 P. 818. The court found that Captain Juan Gonzales and a large number of his heirs lived within the boundaries of the Alameda Grant, and a few of them are mentioned in one of the findings; but the court further finds, in No. 83, that: "It did not appear that the heirs of Captain Juan Gonzales, or any of them living within the boundaries of the grant, had ever claimed or asserted any right to or interest in any portion of said land except such strips as they claimed respectively, until and except as appears from warranty deed from Juan Antonio Rodarte to A. B. McMillen for an undivided one-twenty-fourth part

of the grant, dated January 8th, 1907, and by a warranty deed from Merced Gonzales de Romero and Fabiana Gonzales for the undivided one-fifty-sixth part of the grant, dated February 27th, 1907; and it did not appear that they or any of them occupied or used any portion of the grant except as the other strip owners occupied and used theirs." It was also found that, from a time farther back than the memory of any witness extended, the greater part of the land within the grant has been claimed and occupied in strips, as set forth in Finding No. 1.

Persons of the same name appear in the lists of claimants on both sides, and, under the above finding, they may be the same persons. The record does not inform us upon this point. An examination of Section 2937 shows that the fee simple title provided for ripens even against the rightful heirs or true owners of the grant. The section provides that it shall accrue "against all, and all manner of person or persons whatsoever and any person or persons, their children or their heirs or assigns, who shall neglect or who have neglected for the said term of ten years, to avail themselves of the benefit of any title, legal or equitable, which he, she or they may have to any lands, tenements or hereditaments, within this Territory, by suit of law or equity effectually prosecuted against the person or persons so as aforesaid in possession, shall be forever barred." This language is not ambiguous, it needs no construction, and there is no reservation or limitation in it which would protect the heirs of Captain Juan Gonzales, admitting that

they were the true owners of the grant, from the operation of this provision and from the maturing of a fee simple title against them. The rule of law is well settled that where one is in actual possession of a portion of the tract under color of title, his possession will be presumed to extend by construction to the limits of the land described in his deed. This is too well settled to require the citation of authorities to support it. Indeed, appellants' counsel, in his brief, concedes this in almost identical language. Applying this doctrine to the interveners in this case, it being admitted that they actually occupied and cultivated that portion of their strips of land lying in the valley, such possession would extend to the entire tract described, including the grazing lands on the mesa. And the court finds that they actually used the lands other than cultivated for pasturage and grazing, the only use of which the lands were susceptible, so that their possession does not rest alone upon the legal presumption of possession.

From the review of the case thus far, it is difficult to see how the court in the final decree rendered in this case committed error, unless Section 2937, supra, be either ignored or declared void. No attack is made upon the validity of the section, nor any suggestion that it has been repealed, but a different construction is contended for. The construction sought to be placed upon this section by appellant's counsel is, in his own language, as follows: "Our view of the meaning of that statute is that no one can claim under it except those who are claiming through a grant from Spain,

Mexico, or the United States, and that in order to show that he has such claim he must trace by documents a derivative chain of title from one of those sources. In no other way can the peculiar wording of this statute be given meaning, in other words, it is the purpose of that statute to cure titles which are imperfect, because some deed in the chain of title is imperfect." This construction seems to require so much more than the section specifies, as to place it in direct conflict with it. The conveyances required by the section are "deed or deeds of conveyance, devise, grant or other assurance purporting to convey an estate in fee simple." One deed or a devise by will seems to meet the requirement, provided it purports to convey a fee simple title. Indeed, the construction contended for, carried to its logical conclusion, would render it impossible to obtain any benefit whatever under the statute, and it seems to us that such a construction is plainly inconsistent with the remedial purpose and intent of the legislature which enacted it, as indicated by the unambiguous language used. Where language used in a statute is plain and unambiguous, it is not the subject of construction. It is further contended, "that in order to acquire title by adverse possession all of the requirements above mentioned are absolutely essential, and the courts of this territory have steadily adhered to that rule. That in order to constitute adverse possession it must be actual, open, visible, notorious, continuous, exclusive, hostile, and under claim of right." This is a correct statement of the law as to the acquirements of title by adverse possession under ordinary limitation statutes

such as are commonly enacted, where title enures simply by reason of a limitation, and not by virtue of a fee simple title provided as an affirmative right, as in Section 2937. Section 2938, Compiled Laws 1897, is a general statute of limitation pure and simple with direct application to titles sought to be acquired by adverse possession for the same length of time required by Section 2937, and both of these sections formed parts of Chapter 17, Laws 1858. Section 2938, was Section 2 of Chapter 17, Laws of 1858. This section has been materially amended by two legislatures, and as amended is as follows: "Section 2938. No person or persons, nor their children or heirs, shall have, sue or maintain any action or suit, either in law or equity, for any lands, tenements or hereditaments, against any one having adverse possession of the same continuously in good faith, under color of title, but within ten years next after his, her or their right to commence, have or maintain such suit shall have come, fallen or accrued, and all suits, either in law or equity, for the recovery of any lands, tenements, or hereditaments so held, shall be commenced within ten years next after the cause of action therefor has accrued: Provided, that if any person entitled to commence or prosecute such suit or action is or shall be, at the time the cause of action therefor first accrued, imprisoned, of unsound mind, or under the age of twenty-one years, then the time for commencing such action shall in favor of such persons be extended so that they shall have one year after the termination of such disability to commence such action, but no cumulative disability shall prevent the

bar of the above limitation, and this proviso shall only apply to those disabilities which existed when the cause of action first accrued, and to no other. 'Adverse possession' is defined to be an actual and visible appropriation of land, commenced and continued under a color of title and claim of right inconsistent with and hostile to the claim of another; and in no case must 'adverse possession' be considered established within the meaning of the law, unless the party claiming adverse possession, his predecessors or grantors, have for the period mentioned in this section continuously paid all the taxes, territorial, county and municipal, which during that period have been levied upon the land or interest claimed, whether assessed in his name or that of another." This section was amended by Chapter 63, Laws 1899, but the only substantial change made was the addition of the following provision: "Against any one having adverse possession of the same continuously in good faith, under color of title, and who has paid taxes lawfully assessed against the same" and fixing one year instead of three as to those under disabilities specified. In 1905, this section was further amended by the addition of the significant clause beginning with the definition of adverse possession in the section above quoted. It will be seen, therefore, that while section 2938 has been amended so as to require color of title in good faith, payment of taxes, and made specifically an adverse possession statute, and the term 'adverse possession' has been defined by the statute, not one of these provisions have been inserted by amendment in Section 2937. The latter

section remains practically unchanged. Counsel for appellants insist strenuously that the only title appellees have is by adverse possession. It appears, however, that the section under which they claim makes no mention of adverse possession notwithstanding the companion section of the same act has been amended to so provide. There seems to be no foundation for this contention by appellants, so far as the statute indicates, as the reverse seems to have been the intention of the legislature. Nor are the interveners tenants in common as among themselves, as they claim in severalty and independently of each other; nor are they tenants in common, or co-tenants with the heirs of Captan Juan Gonzales as they do not claim to own the grant or any interest in the grant as such, as heirs of undivided interest, and they deny that they are tenants in common with appellants, who claim to be the true owners of the grant in undivided interests. Consequently the possession of the interveners cannot be the possession of all, in the sense that the possession of one co-tenant is the possession of all other co-tenants. Interveners claim in severalty separately described tracts of land, to which title in fee simple has ripened in each of them under Section 2937, supra, and not by adverse possession except in a general sense. They hold under a statute which provides that when they have complied with the terms of the statute they shall have a fee simple title, and "**they shall be entitled to keep and hold in possession such quantity of lands as shall be specified and described in his, her or their deeds of conveyance, devise, grant or**

other assurance as aforesaid in preference to all and against all and all manner of person or persons whatsoever."

The contention of appellant's counsel, which is deserving of most serious consideration, is that announced in the case of Hunnicutt v. Peyton, 102 U.S. 333, 26 L. Ed. 113, in which the court says: "Where the rightful owner is in the actual occupancy of a part of his tract, he is in the constructive and legal possession and seisin of the whole, unless he is disseised by actual occupation and dispossession, and where the possession is mixed, the legal seisin is according to the legal title, so that in the case at bar there could be no constructive possession on the part of the defendant or his grantors, even if that might exist if he has had actual possession of a part, and no one had been in possession of the remainder." This doctrine has been adopted and announced by this court in the case of Jenkins v. The Maxwell Land Grant Co. et al., 15 N.M. 281, 107 P. 739, and other cases. It seems to have been applied by the courts in all of the applicable cases which have been examined wherein claimants have sought, by adverse possession to hold lands even against the owner of the true title. It will be observed, however, that these are cases where the assertion of title by adverse possession is based upon statutory provisions similar to those of Section 2938, supra, which bars a right by action after the statutory period of time has elapsed. The claimants by adverse possession in these cases do not assert title, but merely the bar of the statute

denying a right of action even to the owner of the true title. Section 2938, Compiled Laws 1897, is the law of this territory upon which claims of adverse possession are based, and is purely a statute of limitation which does not purport to give an affirmative title in fee simple, as does Section 2937 above referred to. The case of Probst v. Presbyterian Church, 129 U.S. 182, 32 L. Ed. 642, 9 S. Ct. 263, is instructive upon this point. This case arose in the City of Santa Fe, under Section 1881, Compiled Laws of 1884, which is identical with Section 2938, Compiled Laws 1897, prior to its amendment. At this time this section did not require either color of title or payment of taxes to be shown in support of the claim of adverse possession. The Supreme Court of New Mexico substantially held that possession for the statutory period was insufficient, but that color of title was also required. The Supreme Court of the United States, upon appeal reversed the lower court, using the following language: "Nor is it necessary that the defendant shall have a paper title under which he claims possession. It is sufficient that he asserts ownership of the land, and that this assertion is accompanied by an uninterrupted possession. It is this which constitutes adverse possession, claiming himself to be the owner of the land. This is a claim adverse to everybody else, and the possession is adverse when it is held under this claim of ownership, whether that ownership depends upon a written instrument, inheritance, a deed, or even an instrument which may not convey all the lands in controversy. If defendant asserts his right to own the land in dispute, asserts his right to the

possession, and his possession is adverse and uninterrupted, it constitutes a bar which the statute intended to give to the defendant." The latest declaration of this court upon this subject is in the case of John Jenkins v. The Maxwell Land Grant Co. et al., 15 N.M. 281, 107 P. 739, which case is also instructive upon the question of mixed possession. While the case was a comparatively recent one, it was claimed that the inception of the adverse possession was prior to the amendment of the statute requiring color of title and payment of taxes to be shown, and this was not questioned. Upon the question of mixed possession, however, the defendants invoked the doctrine laid down in the case of Hunnicutt v. Payton, supra, and it was sustained and applied. From the facts in that case it appeared that Jenkins lived and made small improvements upon a tract of about thirty acres of land, cultivated about five acres, but in addition he claimed, by adverse possession, more than six thousand acres of timber and grazing lands, not by fencing or marking the boundaries thereof, but because he and his family rode around what he claimed to be his boundaries and drove the stock of other parties from the lands. It further appeared, however, that the Maxwell Land Grant Company was the owner of the true title, and that during all of the years Jenkins resided there the company had headquarters and agents in Raton, which was upon the grant, and that the agents of the company mined and prospected for coal, and permitted other parties to do so also, upon the land and near Jenkins' house; that they leased portions of the Jenkins land, as well as other portions

of the grant, grazed large herds of stock upon the lands, in short, the agents of the true owner used the lands as freely as if Jenkins had not been there. The court properly held in that case that the owner of the true title, by its agents, was in actual possession of a portion of the grant, and therefore its seisin extended to all of the grant not actually occupied by Jenkins, which could not in any event extend to more than the thirty acres upon which Jenkins lived. As was said in the Hunnicutt case: "The reason is plain. Both parties cannot be seised at the same time of the same land under different title. The law therefore adjudges the seisin of all that is not in the actual occupancy of the adverse party, to him who has the better title."

Appellants claim the ownership of what they denominate the common lands, under deeds of conveyance from Juan A. Rodarte, Merced Gonzales de Romero and Fabiana Gonzales of date 1907, to Alonzo B. McMillen, upon the theory that Montoya and the grantors of Mr. McMillen, being heirs of Captain Juan Gonzales, deceased, and in possession of a part of the Alameda Grant, were owners of the true title to those lands; that the common lands are not in the actual, but only in the constructive, possession of the interveners, and are therefore drawn to the true title by conclusive presumption, conceding a mixed possession to have existed. Finding of Fact No. 1 described the nature of the possession and use of the lands involved, as follows: "The interveners claim strips of land within the Alameda Grant very narrow in proportion to their length, most or them being only a few

yards in width each, and extending from the Rio Grande west to the ceja, or ridge, dividing the watershed of the Rio Grande from that of the Rio Puerco, and forming the western boundary of the grant, a distance of about sixteen miles. Most of them include land between the Rio Grande and the foothills at the west of the valley, which is adapted to cultivation, and the land extending from the foothills to the ceja of the Rio Puerco, which is adapted to grazing only. Most of the interveners live on the easterly ends of the strips of land they claim, and cultivate such portions of the bottom lands between the river and the foothills in the respective strips as they require. Near the river the land is what is termed bosque; that is, land covered with a growth of brush, trees, and wild grass, and is used for pasturage. In the valley the strips of land are to some extent separated by fences, and to some extent the bosque is separated in that way from the cultivated lands. From the foothills west there are no fences, nor are there any fences at the western boundaries of the strips or of the grant. By stipulation between the parties the titles to the lands between the river and the foothills are not to be determined in this action, but that does not exclude the evidentiary bearing, if any, which the use, occupation, and claims of possession and ownership of these lands by interveners respectively, so far as they appear in evidence, may have on their use, occupation and claims of possession respectively of the lands extending westerly from the foothills. The last named land bears a scanty growth of grass and other herbage, and is without water, it being customary

and necessary to have animals pastured there go to the Rio Grande for water at intervals of three or four days, except for short and infrequent periods when their needs are supplied by rain or snow. By agreement, or common understanding, which has ripened into a general custom, the interveners and their predecessors in claim of ownership have used those westerly portions of the strips they claimed in common with each other, and with others claiming ownership in the grant, no one attempting to keep his animals exclusively on the land he claimed nor requiring others claiming ownership to keep their animals off such land. To some extent those who were not claiming ownership of any land within the grant pastured their animals on the portion of it in question west of the foothills and on the strips claimed by the interveners with the other animals pastured there, without objection by those who claimed the strips, but without their consent, except as they failed to take active measures to prevent such intrusion. This method of use was the one most convenient, economical, and advantageous to the interveners and as to all the strips, except the northern one of Gonzales, the only practicable one because of the size and shape of the respective strips which would make the expense of fencing them greatly disproportionate to their value, the character and location of the land, the scantiness of herbage and the lack of water upon it, and for no other reasons appearing in the evidence." If the interveners relied upon adverse possession under Section 2938, there can be little doubt but that the circumstances under which these mesa lands

were held would constitute constructive possession, such as would, by legal presumption, adhere to the true title. If, however, the conclusions of the court in the construction of Section 2937, are correct, as we regard them, this is not a proceeding in adverse possession under Section 2938, so far as the interveners' rights are involved, but is a proceeding under Section 2937 in which interveners rely upon a fee simple title by deeds under the terms of the statute. As we have seen, a fee simple title, matured under Section 2937, divests the title of the true owner as well as all others, and, such being the case, the law as laid down in the case of Hunnicutt v. Peyton, supra, would seem to be inapplicable to the case now under consideration. It is true, there is an adverse possession required to mature title under Section 2937, but it is not the same as under Section 2938. This section was amended by Section 2, chap. 63, Laws 1899, so as to require color of title and payment of taxes, as above stated, and by Chapter 76, Laws 1905, was again amended as follows: "'Adverse possession' is defined to be an actual and visible appropriation of land, commenced and continued under a color of title and claim of right inconsistent with and hostile to the claim of another; and in no case must 'adverse possession' be considered established within the meaning of the law, unless the party claiming adverse possession, his predecessors or grantors, have for the period mentioned in this section continuously paid all the taxes, territorial, county and municipal, which during that period have been levied upon the land or interest

claimed, whether assessed in his name or that of another."

Now, the fact that neither of these amendments were made applicable to the next preceding section, but were made specifically applicable to Section 2938, is quite significant and we think indicates the intention of the Legislature not to make these requirements applicable to the section of the statute which confers a fee simple title as provided for in Section 2937.

In this case, under the findings of fact, the interveners claim, severally, strips of lands "under deeds of conveyance purporting to convey an estate in fee simple" accompanied by residence and cultivation as to bottom lands, and the timber and grazing lands were used for the only purpose for which they were suitable, as the findings state, for more than ten years. These conveyances define the boundaries of such strips, from which it appears that the timber and grazing lands are included in the boundaries, as well as the residence and cultivated lands. The interveners, being actual occupants and in possession of the lands embraced in their deeds, would have the right to use them in such manner as they saw fit, and we see no reason why they should not use them as other owners of deeded lands may do.

The final decree has a provision as to each of the interveners similar in terms to that of Jose Chavez, which is as follows: "It is further considered, adjudged, and decreed that the intervener Jose Chaves

is the owner in fee simple absolute and in severalty of the following described strip, tract and parcel of land situate within the limits of the Alameda Land Grant, bounded and described as follows: Containing 20 varas in width from north to south, and in length extending from the Rio Grande on the east to the ceja of the Rio Puerco on the west, and bounded on the north by land claimed by Felix Tafoya y Gonzales, and on the south by land claimed by Jose Gonzales y Montoya; and which said strip corresponds to strip No. 20 of the list of strips referred to in the findings of fact in said cause and in the list of strips annexed hereto and made a part of this decree." The interveners, by this decree, hold their respective tracts of land as "owners in fee simple absolute and in severalty" to the exterior boundaries of the description given in this deed, there being no limitations in the deeds.

In order to invoke the doctrine laid down in the case of Hunnicutt v. Peyton, supra, it is essential that the owner of the true title, or his heirs or agents, shall be in actual possession of some part of the lands while claiming the whole of the lands. It is clear, from Finding of Fact No. 83, that the heirs of Juan Gonzales who resided on this land, did not claim to own the whole grant, nor even the common lands. Upon this point the court found as follows: "It appeared, however, and is so found, that from a time farther back than the memory of any witness extended, the greater part of the land within the limits of the grant has been claimed and occupied in strips, as set forth in Finding of Fact 1, the land from the foothills to the

ccja of the Rio Puerco in common for pasturage, and the bottom lands generally by those claiming the ownership of them separately, as set forth in said finding. It did not appear that the heirs of Captain Juan Gonzales or any of them living within the boundaries of the grant had ever claimed or asserted any right to or interest in any portion of said land grant except such strips as they claimed respectively until and except as appears from warranty deed from Juan Antonio Rodarte to A. B. McMillen for an undivided one twenty-fourth part of said grant, dated January 8th, 1907, and by warranty deed from Merced Gonzales de Romero and Fabiana Gonzales for the undivided one fifty-sixth part of said grant, dated February 27th, 1907; and it did not appear that they or any of them occupied or used any portion of said grant except as others within the grant occupied and used the strips they claimed, the bottom lands in severalty and the grazing lands in common, as set forth in said Finding of Fact 1." From this finding it appears that Vicente Montoya, appellant, and the grantors of McMillen were strip owners only, and never made any claim to ownership of any lands of the Alameda Grant other than described in the small strips on which they respectively resided. In other words, they held their lands just as they held their tracts. Therefore, they did not claim to own the whole grant, or all the common lands thereof as heirs of Captain Juan Gonzales, but only claimed to own and be in possession of the small strip upon which their residences were. If this is true they were not in position to invoke the presumption insisted upon by

appellant's counsel, nor are they within the doctrine announced in the Hunnicutt case. Indeed, the interveners, being in possession of a part, claiming certain strips of land described in deeds of conveyance, are the parties to whom the benefit of this presumption would enure to the extent of the lands embraced within the exterior boundaries of their respective deeds.

There are two tracts of land claimed by Candido G. Gonzales and Francisco Lucero y Montoya as to which the findings are somewhat different, in this: that neither of them ever lived upon or improved any portion of the lands described in the conveyances under which they claim ownership. As to the Gonzales tract, which is the last of several tracts he claims, the following finding of fact was made by the court: "The Rio Grande now runs close to the foothills by this land, and there is practically no meadow land between the foothills and the river. Formerly there was a strip of bottom land between the Rio Grande and the foothills which formed a part of the tract herein claimed by the intervener, but neither he nor his predecessors in title, nor any other person so far as the evidence shows, ever cultivated, enclosed, erected buildings or lived upon any part of said tract, or made any use of it except for grazing, as set forth in Finding of Fact 1. The court further finds that the description of the real estate in said Exhibit No. 28 was originally of a tract of land 610 varas wide, and that said description was so altered as to describe the land as being 1,610 varas wide; but the court is

unable to find when said alteration was made, except that it was made after the original instrument was written, in a different ink, and was made some time prior to the year 1883." While it may be that lapse of time may have cured defects suggested by appellants' counsel to the documentary evidence of title admitted at that trial, the fact that no actual possession was ever established on any portion of this tract we are disposed to regard as fatal to a recovery by Gonzales of this particular tract, and the same may be said of the Lucero y Montoya tracts covered by Exhibits 65, 65A and 65B, as no actual possession of any part of those lands was established although part of the lands were capable of cultivation. We have just sustained the possession of the interveners to the mesa lands adjoining the valley land, by reason of its use for grazing purposes, but this was done upon the ground that by reason of actual residence, cultivation, improvements, and other visible occupancy of a part of the lands embraced in their deeds, by conclusive legal presumption this possession extended to the whole tract embraced in the conveyances. But, even under Section 2937 deeds alone are not sufficient, unaccompanied by actual occupation or at least a part of the tract, to mature a fee simple title in ten years. The possession is as essential to that end as the deed, but both are necessary. As to those tracts, there never has been actual visible possession of any part of the lands, therefore, conceding that the conveyances were valid, fee simple title could not mature under the circumstances of this case. Bergere v. U. S., 168 U.S.

66, 42 L. Ed. 383, 18 S. Ct. 4; Whitney v. U. S., 167 U.S. 529, 42 L. Ed. 263, 17 S. Ct. 857.

A peculiar and quite unusual situation exists in this case. A decree of partition was entered, and the unoccupied lands were declared to be the property of the appellant and a large number of the heirs and assigns named in the decree. The decree did not state that they were in possession of the lands, but did declare them to be owners of certain interests therein. This decree was entered before the rights of the interveners were declared. This decree was not formally set aside by the court, but, in effect, was modified to the extent of the lands awarded to the interveners in the final decree upon the intervention. The effect of the decree in partition is to award to the partition claimants the ownership of all lands involved in this proceeding not carved out of the Alameda Grant by the decrees in favor of the interveners. Fee simple title not having matured in favor of Candido G. Gonzales and Francisco Lucero y Montoya to these particular tracts, the decree in partition is operative upon those lands, and awards them to the partition claimants, thereby divesting those interveners, Gonzales and Lucero, of any interest therein.

We do not deem it necessary to consider the other questions raised as to these lands. The assignments of error will be overruled insofar as they challenge the correctness of the decree of the court in favor of the interveners, and the decree will be affirmed insofar as it relates to all of the tracts owned by the

interveners, but will not be sustained as to the two last mentioned tracts, and as to those the decree will be reversed and the cause will be remanded for further proceeding in accordance with the views herein expressed.

BOARD OF TRUSTEES OF ANTON CHICO LAND GRANT
vs.
BROWN et al.

No. 2637
SUPREME COURT OF NEW MEXICO
33 N.M. 398, 269 P. 51
June 12, 1928

Appeal from District Court, San Miguel County; Leahy, Judge.

Partition suit between Robert L. Brown and others, wherein the Board of Trustees of the Anton Chico Land Grant intervened. Judgment for intervener, and the other parties appeal.

SYLLABUS

SYLLABUS BY THE COURT

In a contest of title to lands within original outboundaries and United States surveys of two Mexican grants, both confirmed by the same act of Congress, the one a town or community grant, senior as a Mexican concession, the other in form a perfect individual grant, but invalid for lack of authority in the granting officers to alienate the Mexican public domain, but senior in its application to the surveyor general for confirmation, and in having its boundaries fixed by the United States survey, the lands in dispute never having been allotted in severalty under authority of the community, grant, **held**:

(1) Though the then claimants under the individual grant protested before the surveyor general confirmation of the other grant and though the surveyor general may have decided and reported that the community grant had priority, and though Congress confirmed both "as recommended for confirmation by said surveyor general," the confirmatory act (Act of June 21, 1860, 12 St. at L. 71) does not constitute an adjudication of title as between the two, since, by section 4, the rights of each are reserved as against the other.

(2) The claim under the individual grant is superior, because confirmation of it effected a title relating back either to the date of original concession (1823) or to the date of application to the surveyor general for confirmation (1855), while confirmation of the community grant effected, as to its unallotted lands, but an "American title," relating back, if at all, no further than to the date of its application for confirmation (1859).

COUNSEL

Andrieus A. Jones and A. T. Rogers, Jr., both of East Las Vegas, for appellants.

S. B. Davis, Jr., of Las Vegas, C. J. Roberts, of Santa Fe, and F. Faircloth, of Santa Rosa, for appellee.

JUDGES

Watson, J. Parker, C. J., and Bickley, J., concur.
AUTHOR: WATSON

OPINION

OPINION OF THE COURT Appellants are the present owners of New Mexico private land claim No. 1, and appellee of claim No. 29, both confirmed by Act of Congress of June 21, 1860 (12 St. at L. 71); subsequent to which act both were surveyed and patented, the former to Preston Beck, Jr., and the latter to Manuel Rivera and thirty-five others, unnamed, their children, successors and assigns. The former will be herein referred to as the Preston Beck grant, and the latter as the Anton Chico grant.

A suit was commenced in 1876 for partition of the Preston Beck grant. In the course of those proceedings, in 1903, Andrieus A. Jones was appointed receiver, and in such capacity took possession of the lands included within the Preston Beck survey. In 1907 the board of trustees of the Anton Chico Land Grant intervened, claiming superior title to a portion of such lands; such portion being included, as well, within the Anton Chico survey. The lands in dispute will be referred to as the overlap.

Upon the issues of the intervention, the trial court, upon specific findings and conclusions, awarded the overlap to the Anton Chico board. The present appeal is from that judgment. We recently

handed down an opinion reversing the judgment and remanding the cause, with a direction to the district court to dismiss the intervention. A motion for rehearing is now before us. While we see no occasion to change our views as heretofore expressed, it appears that we may have misconceived some of appellee's contentions, and have been led into unnecessary discussion. We therefore withdraw the original opinion, and proceed anew.

The titles of both of these grants have been formerly in litigation. By reference to the decisions, we may abbreviate the statement of facts. Pino v. Hatch, 1 N.M. 125, and Stoneroad v. Beck, 16 N.M. 754, 120 P. 898, involved the Preston Beck title and disclose its history. The history of the Anton Chico grant is set forth in Reilly v. Shipman (C. C. A.) 266 F. 852.

The Preston Beck title originates in a concession made in December, 1823, to Juan Estevan Pino, by the then acting superior political chief of the province, with consent of the provincial deputation. Juridical possession was given in 1825, and appellants and their predecessors in interest seem to have had possession from that day to this. In May, 1855, the then owners of the grant initiated proceedings for confirmation before the surveyor general of New Mexico. He found the grant valid, and, on September 30, 1856, reported it favorably to the Secretary of the Interior, for confirmation by Congress. The survey was made in 1860 and approved in November of that year. Patent issued June 13, 1883.

On behalf of the Anton Chico grant, a concession is claimed by the Governor, dated May 2, 1822, and juridical possession given the same day. Its confirmation proceedings were initiated before the surveyor general in 1859. By his report, dated July 15, 1859, confirmation was recommended. Its survey was made in 1878, and corrected and approved in 1881. Its patent issued March 27, 1883.

The question is which of these two grants has the better right to the overlap. It can be decided upon consideration of appellee's contentions. They are: First, that the Anton Chico should prevail, because, as an original concession, it is prior; and, second, that, since the Preston Beck claimants protested before the surveyor general confirmation of the Anton Chico grant, and the surveyor general overruled the protest, the act of confirmation finally and conclusively adjudicated the question of superiority of title. It will be more convenient to dispose of the second contention first.

The confirmatory act describes no lands and names no confirmees. It confirms the grants as recommended for confirmation by the surveyor general, and by the numbers by which he had designated them in his report. Section 4 provides:

> "That the foregoing confirmation shall only be construed as quitclaims or relinquishments, on the part of the United States, and shall not affect the adverse rights of any other person or persons whomsoever." (12 Stat. 71.)

Pursuant to this section, there was inserted in the granting clause of both patents this:

> " * * * But with the further stipulation that in virtue of the provisions of the aforesaid Act of Congress of the 21st of June, A. D. 1860, that the foregoing confirmation shall only be construed as quitclaims or relinquishments on the part of the United States and shall not affect the adverse rights of any other person or persons whomsoever."

So, to render the confirmatory act intelligible, reference must be had to the proceedings before, and particularly the reports of, the surveyor general. By his report of September 30, 1856, he had said of the Beck grant that it "vests in the grantee a title in fee to all the land embraced within the boundaries set forth in the granting decree." By his report of July 15, 1859, he said of the Anton Chico grant:

> "This claim is contested by the heirs of Preston Beck, deceased, so far as it conflicts with the grant made to Juan E. Pino, of which they are the assigns.
>
> "The grant made by Melgares on the 2d May, 1822, severed the land from the public domain, and placed it beyond the further reach and control of the government."

Appellee considers this a plain expression of the surveyor general that the Anton Chico title is superior because its earlier grant severed the land in question from the public domain, and placed it beyond the power of the Mexican government to grant it

again. So, it is argued, a confirmation of the grant as recommended by the surveyor general includes a ratification by Congress of the surveyor general's decision upon the question and a conclusive adjudication of it. Appellants do not agree with this interpretation of the report, but we may pass that question.

An obvious objection to appellee's contention is that, by section 4, Congress apparently declared that it was not adjudicating anything as between the confirmees and other claimants of the same lands, but was merely deciding the rights of the confirmees as against the government. Section 4 is an apt expression of a refusal to consider or act upon any decision which the surveyor general may have made as to the superiority of title as between the two grants here in question. If that is what section 4 means, appellee's present contention will fall, since it concedes that the decision by the surveyor general had no force, unless Congress adopted it. The fact that the Beck claimants voluntarily submitted the question to the surveyor general is of no importance. Servilleta de la Joya Grant v. Belen Land Grant, 242 U.S. 595, 37 S. Ct. 215, 61 L. Ed. 514.

Reservation of the rights of others is not peculiar to the Act of June 21, 1860. It is expressed in some form in all confirmatory acts and acts establishing confirmation tribunals which we have encountered. See section 15 of the Act of March 3, 1851 (9 St. at L. 631), creating a tribunal for the ascertainment and settlement of private land claims in California; Act of December 22, 1858 (11 St. at L. 374), confirming

claims of pueblos and towns in New Mexico; Act of March 3, 1869 (15 St. at L. 454), confirming private land claims in New Mexico; sections 8 and 13, Act of March 3, 1891 (26 St. at L. 854), creating the court of private land claims.

The occasion and necessity for the reservation in the act of 1851 were considered and set forth in Rodriguez v. United States, 68 U.S. 582, 1 Wall. 582, 17 L. Ed. 689. Mr. Justice Miller, speaking for the court, called attention to the loose and indefinite manner in which the Mexican government made grants, apparently attaching no value to the land, granting it in magnificent quantities, always as a gratuity; the only question being whether the locality asked for was vacant and was public property. These grants were not surveyed when made; indeed, there were no facilities for survey. A map accompanying the application, prepared by unskilled and uneducated herdsmen of cattle, was the only means of locating the claims. The proceeding which Congress had prescribed for confirmation of these grants (Act of March 3, 1851) was one strictly between the claimant and the government. No provision was made for notice to possible adverse claimants, nor for adjudication of adverse claims. The primary object was to ascertain the public domain from that which had become, under the Mexican government, private property. It had happened, as was to have been anticipated, that two or three claims for the same land, or parts of the same, were progressing **pari passu** in the same court, resulting in confirmation and patents

therefor. We cannot doubt that like considerations induced Congress to include the similar reservation in the act of June 21, 1860.

It has been often pointed out that the purpose of Congress in creating tribunals for the confirmation of private land claims, and in confirming such claims by direct act, was to determine what lands belonged to the United States by segregating such as had become, under the former sovereignty, private property; not to adjudicate, nor to provide for the adjudication, of conflicting private claims. Rodriguez v. U. S., supra; U.S. v. Morillo, 68 U.S. 706, 1 Wall. 709, 17 L. Ed. 626; U.S. v. Conway, 175 U.S. 60, 20 S. Ct. 13, 44 L. Ed. 72; Botiller v. Dominguez, 130 U.S. 238, 9 S. Ct. 525, 32 L. Ed. 926; Chaves v. Whitney, 4 N.M. 611, 16 P. 608; Meader v. Norton, 78 U.S. 442, 11 Wall. 442, 20 L. Ed. 184.

The leading case in exposition of a reservation similar to section 4 is Beard v. Federy, 70 U.S. 478, 3 Wall. 478, 18 L. Ed. 88. There Mr. Justice Field, speaking for the court, demonstrates that "third persons," the term employed in the act of March 3, 1851, does not embrace "all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property."

Following that decision, it has been well established that confirmation is conclusive as against the United States and as against a mere intruder or one

claiming a title originating under the United States subsequent to the change of sovereignty. Tameling v. U.S. Freehold & Emigration Co., 93 U.S. 644, 23 L. Ed. 998; Knight v. United Land Association, 142 U.S. 161, 12 S. Ct. 258, 35 L. Ed. 974; Russell v. Maxwell Land Grant Co., 158 U.S. 253, 15 S. Ct. 827, 39 L. Ed. 971.

But it is as well established that, in a case where the adverse party claims title under the former sovereign which is, equally with that of the confirmee, entitled to protection by the United States, confirmation is not conclusive, and it is for the courts to decide which claimant has "the better right." Beard v. Federy, supra; Henshaw v. Bissell, 85 U.S. 255, 18 Wall. 255, 21 L. Ed. 835; Rodriguez v. U. S., supra; Miller v. Dale, 92 U.S. 473, 23 L. Ed. 735; Adam v. Norris, supra; Meader v. Norton, supra; Carpenter v. Montgomery, supra; More v. Steinbach, 127 U.S. 70, 8 S. Ct. 1067, 32 L. Ed. 51; U.S. v. Conway, supra; U.S. v. Baca, 184 U.S. 653, 22 S. Ct. 541, 46 L. Ed. 733.

Tameling v. United States Freehold & Emigration Co., supra, is relied upon by appellee, and is a frequently cited case. That decision is not, however, opposed to the rule just stated. As Mr. Justice Davis there said, the cause was submitted upon an agreed statement of facts. That statement appears in the report of the decision by the Colorado territorial Supreme Court. 2 Colo. 411. It there appears that the only fact stipulated with reference to the defendant's claim was that he was in possession. For the purposes of the decision, he was a mere intruder. The language

of the opinion should be considered in the light of that fact.

Considering these decisions, we see no reason for discounting the face value of section 4. It seems to reserve the right of each grant to contest title with the other. Such was the uniform policy. Whatever may have been the intention of the surveyor general, we are satisfied that Congress left the question open.

This brings us to appellee's first and principal contention – that Anton Chico, being the earlier grant, must prevail.

The validity of the Anton Chico title is questioned in a number of respects. It is pointed out that the document relied upon as the origin of its title is executed in the name of the King of Spain at a time several months after the establishment of Mexican independence. It is contended that its title papers are not genuine. These matters will not assume any importance in this decision. It is contended that the title which Congress confirmed was to the individuals named and unnamed as inhabitants of the town of Anton Chico. It was so held in Reilly v. Shipman, supra. On the present motion appellee's counsel distinctly admit that such is the case. So we are here dealing with a town or community grant.

In form, the Preston Beck title rests upon a perfect grant to an individual, purporting to pass title in praesenti; such a grant as required no confirmation, and gained nothing but official recognition by it. Ely R. E. & I. Co. v. Watts (C. C. A.) 262 F. 721; Ainsa

v. N.M. & A. R. Co., 175 U.S. 76, 20 S. Ct. 28, 44 L. Ed. 78; U.S. v. Conway, supra. Its invalidity is claimed, however, on the ground that the granting officers were, at the particular time, without authority to dispose of the Mexican public domain. This was the result arrived at in Stoneroad v. Beck, supra. That decision was reversed by the United States Supreme Court. For the purposes of this appeal, however, we shall assume, without deciding, that the original concession to Juan Estevan Pino was invalid, for the reason stated.

The admission that the Anton Chico is a town or community grant involves important consequences. It is settled that in such cases lands not actually allotted to settlers remained the property of the sovereign, to dispose of as it might direct. U.S. v. Santa Fe, 165 U.S. 675, 17 S. Ct. 472, 41 L. Ed. 874; U.S. v. Sandoval, 167 U.S. 278, 17 S. Ct. 868, 42 L. Ed. 168; Rio Arriba Land & Cattle Co. v. U. S., 167 U.S. 298, 17 S. Ct. 875, 42 L. Ed. 175; U.S. v. Pena, 175 U.S. 500, 20 S. Ct. 165, 44 L. Ed. 251; Bond v. Barela, 16 N.M. 660, 120 P. 707, affirmed, 229 U.S. 488, 33 S. Ct. 809, 57 L. Ed. 1292. Appellee's counsel further admit that none of the lands here in controversy had ever been allotted. It necessarily results that the **jus disponendi** which belonged to the Mexican government passed to the United States; that it is the quitclaim rather than the confirmation feature of the act of June 21, 1860, to which the town of Anton Chico is indebted for its title to the unallotted lands within its boundaries; and that Congress, in passing

the title, performed an act of grace. It also results that, if the provincial officers had possessed the authority to alienate the public domain, the earlier town or community grant did not stand in the way of a lawful grant to Pino, or of a confirmation of such grant by the United States.

By admissions and by assumptions favorable to appellee, we have reduced the question to this: As between a town grant, not intended nor assuming to pass title, and an individual grant, intended and purporting to pass title, but void for lack of authority in the granting officers, the former being earlier as an original concession, and the latter having first initiated confirmation proceedings by application to the surveyor general, and having first procured survey, which has "the better right?"

Appellee relies on Jones v. St. Louis Land & Cattle Co., 232 U.S. 355, 34 S. Ct. 419, 58 L. Ed. 636, which it insists furnishes the rule of decision for this case. There the Supreme Court of the United States reversed the territorial Supreme Court in Stoneroad v. Beck, supra. The case involved an overlap between the Preston Beck grant and the Perea grant; the latter having been confirmed, also by the Act of June 21, 1860, as private land claim No. 16. The territorial Supreme Court, holding both grants void in their inception, and that the confirmation proceedings gave rise to no superiority of title to the overlap, awarded it in undivided moieties. But the Supreme Court of the United States gave it to the Preston Beck claimants.

In this decision the court cited Henshaw v. Bissell, supra, to the effect that:

> "If there be claims under two patents, each of which reserves the rights of the other parties, the inquiry must extend to the character of the original concession."

It also quoted Miller v. Dale, supra:

> " * * * We must look into the character of the original concessions; and, if they furnish no guide to a correct conclusion, we must seek a solution in the proceedings had before our tribunals and officers by which the claims of the parties were determined."

Thus the court seems to adopt the doctrine of the earlier decisions cited above as to the effect of section 4, and to adopt the further rule that, if the character of the original concessions is such that no priority results, the inquiry must extend to the proceedings had after sovereignty changed.

Counsel disagree completely as to the meaning of this decision. The doubt grows out of the peculiar and controlling facts in the case. The Preston Beck grant was "in all its steps" prior to the Perea grant. Moreover, the Perea grant was admittedly void in its inception; its contention being merely that Preston Beck was no better. So, on either of the two theories which the language of Mr. Justice McKenna suggests, the Preston Beck grant was bound to prevail. It was unnecessary to decide whether the territorial officers had power to make the grant. If they had, it would

prevail because prior in time as an original concession. If they had not, it would prevail over another invalid grant because of its prior initiation of confirmation proceedings and its prior survey. There was no possible theory upon which the Perea grant could hope even to divide the land, except that adopted by the territorial court, and that theory was found erroneous.

Appellee's counsel concede that, if the territorial officers who assumed to make the Preston Beck grant had acted with authority, that grant would take title as against the earlier Anton Chico grant. Their proposition is that, as between two invalid grants, both confirmed by Congress, priority of original concession is conclusive of superiority of title, and that Jones v. St. Louis Land & Cattle Co. so holds. They further contend that, under the rule stated in that case, if priority can be determined from the relative situations of the two grants before sovereignty changed, there is no occasion to inquire into the proceedings had thereafter under United States auspices. The result is, as they argue, that the Anton Chico grant of 1822 is superior to the Preston Beck grant of 1823.

This position of counsel is not without support in the opinion here being considered. We cannot say that the court did not entertain the view that, when the contest was between two grants, both perfect and complete in form, but both void for lack of authority of the officers making them, both titles, after confirmation, should be considered, on the doctrine of

relation, as effective from their dates of original concession. It seems quite clear, on the other hand, that the decision was not based on that theory. If it was, it was quite unnecessary to consider the American proceedings at all and to reiterate that Preston Beck was prior "in all its steps." Counsel disregard the court's pronouncement as to the effect of priority of application to the surveyor general and of survey, and here renew the argument, fully developed by the territorial Supreme Court, that these proceedings furnish no basis for superiority of title. That, we think, was adversely disposed of by the United States Supreme Court.

While not prepared to assent to appellee's interpretation of the opinion in Jones v. St. Louis Land & Cattle Co., we need not reject it. The case at bar is different. Even if found to apply the doctrine of relation to the Preston Beck and the Perea grants, it does not follow that it applies to the Anton Chico grant. Under appellee's theory of the Jones decision, the Preston Beck grant would be effective as of 1823. Yet it would not follow that the Anton Chico grant is effective from 1822.

As held in Reilly v. Shipman, supra, and as counsel for appellee here expressly concede, the Anton Chico grant was confirmed as a town or community grant. It cannot be said of it that "the act of Congress was not a gratuity. It was intended to be a discharge of the obligations of the treaty between the United States and Mexico." It cannot be said of it that "it was a confirmation of rights which existed, and as

they existed." Nor can it be said that "we are dealing with rights which were recognized by the new sovereign because they were supposed to have legal validity under the old sovereign." On the contrary, it is a thoroughly established principle that Congress was not obligated by treaty to recognize such grants, except in so far as lands had been allotted under them. It was at liberty to claim the unallotted lands as public domain. Quitclaiming these lands to the town was gratuitous. A mere confirmation of Anton Chico's existing rights would have left the town without title to the overlap. When sovereignty changed, there were many imperfect and inchoate claims to lands. Such were described in Jones v. St. Louis Land & Cattle Co. as of imperfect obligation, affecting only the conscience of the United States, and which received from the new sovereign "a vitality and efficacy which they did not before possess." "When confirmed by Congress," such grants become "American titles," and take "their [legal] validity wholly from the act of confirmation and not from any French or Spanish element which entered into their previous existence." It was of such grants that it was said that "the doctrine of senior or junior equities and of relation back has no application in the jurisprudence of such cases." But the Anton Chico grant, as to lands not allotted, is not even in this class. The former government had never passed title, or promised to pass it. There was no obligation on this government, and nothing to affect its conscience. We so understand the decisions hereinbefore cited.

Under the Jones decision, the effective date of the Preston Beck grant is either 1823, by relation to the original concession, or 1855, by relation to its application to the surveyor general. It does not matter which date is adopted. If the "American title" of the Anton Chico grant should relate back to its application to the surveyor general, a matter not necessary to be decided, it would not avail. It can only prevail on the theory that it takes some efficacy from the Mexican concession, a theory we cannot entertain.

Another view might be taken, leading to the same result. It was, as above pointed out, laid down by Mr. Justice Field, in Beard v. Federy, supra, that the reservation similar to section 4 here involved did not contemplate that every person might challenge the validity of a confirmed grant. It contemplated "only those who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property." As to the unallotted lands here involved, the board of trustees of the town of Anton Chico holds but an "American title." Bond v. Barela, supra. It could not have resisted any disposition the government might have seen fit to make of the lands. Hence, it is not in a position to challenge the confirmation of them to the Preston Beck claimants any more than it would have been in a position, while under Mexican sovereignty, to challenge a grant made under lawful authority of that government. More v. Steinbach, supra.

It is our conclusion that appellee's contentions cannot be sustained. The trial court sustained them

and based the decision thereon. In this, according to our views, there was error. The error is fundamental, and appellee's position could not be improved upon another trial. It is therefore necessary to reverse the judgment, and it seems proper to remand the cause with a direction to the district court to dismiss the intervention. The present motion for rehearing is denied; but, since the present opinion goes somewhat further than the opinion withdrawn, appellee will have leave to file a second motion for rehearing within the usual time allowed for filing motions for rehearing.

It is so ordered.